CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

NO. 419

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

JONES & LAUGHLIN STEEL CORPORATION

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR JONES & LAUGHLIN STEEL CORPORATION.

EARL F. REED,
CHARLES ROSEN,
W. D. EVANS,
JOHN E. LAUGHLIN, JR.,
Attorneys for Respondent.

THORP, BOSTWICK, REED & ARMSTRONG,
2812 Grant Building,
Pittsburgh, Pa.
ROSEN, KAMMER, WOLFF & FARRAR,
Hibernia Bank Building,
New Orleans, La.

SMITH BROS. CO. INC., LAW PRINTERS, 208-212 GRANT STREET, PITTSBURGH, PA.

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BRIEF FOR JONES & LAUGHLIN STEEL CORPORATION.

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 975-977) is reported in 83 F. 2nd 998. The decision of the petitioner, National Labor Relations Board, appears in the record at pages 23 to 45.

JURISDICTION.

The decree of the United States Circuit Court of Appeals for the Fifth Circuit, dismissing the petition of the National Labor Relations Board, was entered on June 15, 1936, and on July 15, 1936, the petition of the National Labor Relations Board for a rehearing was denied, without written opinion. The petitioner filed its Petition for Writ of Certiorari on September 30, 1936, which was granted on November 9, 1936. This Court's jurisdiction is based upon Section 240 (a) of the Judicial Code, as amended, and Section 10 (e) of the National Labor Relations Act.

STATUTE INVOLVED.

The National Labor Relations Act (Act of July 5, 1935, C. 372, 49 Stat. 449; U. S. C., Sup. I, Title 29, Sec. 151 *et seq.*) is set forth in the appendix to the petitioner's brief in *The Associated Press v. National Labor Relations Board* (No. 365) and its various provisions are summarized at pages 52 to 54, *infra*.

STATEMENT OF THE CASE.

Although the essential facts are not seriously disputed, the version which appears in the petitioner's brief cannot be accepted without question because it neglects important elements in the background, which, if given proper emphasis, will clearly expose the fundamental errors of the petitioner's argument. In approaching the statute which is involved, the petitioner has brushed past the real purpose of the National Labor Relations Act in its effort to convince this Honorable Court that Congress had no legislative object other than the protection of interstate commerce. Similarly, in setting

forth the facts of this case, the petitioner has endeavored to hitch them to the current of commerce by magnifying a simple controversy between an employer and a dozen employees into a national crisis, threatening the very foundations of the movement of commerce. Stripped of the importance which the petitioner seeks to attach to them, the ultimate facts are relatively simple and obvious.

1. The Pleadings.

This proceeding had its origin in an order issued by the petitioner against the respondent, Jones & Laughlin Steel Corporation, pursuant to the National Labor Relations Act. The petitioner is a *quasi* judicial agency constituted under the Act, with authority to hear and determine complaints against employers, arising under Section 8 of the Act.

Some time prior to January 23, 1936, thirteen individuals who had been employed in the respondent's steel plant at Aliquippa, Pennsylvania, complained to the petitioner of alleged discrimination against them by the respondent, because of their affiliations with a labor organization, and on that date the petitioner issued a formal complaint against the Jones & Laughlin Steel Corporation (R. 12) in which it charged that the respondent had engaged in unfair labor practices, in violation of Section 8 (3) of the National Labor Relations Act, by the discharge of twelve of the complaining employees and the demotion of the thirteenth. It was alleged that the respondent had discharged and demoted these individuals, because of their union activities, and by reason of such acts, the respondent was charged with discrimination against a certain labor organization known as the Amalgamated Association of Iron, Steel and Tin Workers of North America, Beaver Falls Lodge

No. 200, of which the individuals were alleged to be members. In order to support the jurisdiction of the petitioner, the complaint set forth that the acts of the respondent constituted unfair labor practices, within the meaning of the National Labor Relations Act, and had burdened and obstructed interstate commerce and the free flow thereof, and had led and tended to lead to labor disputes, burdening and obstructing commerce and the free flow thereof (R. 14, 15). In connection with this complaint, the petitioner issued a notice of hearing, requiring the respondent to appear and answer the charges set forth in the complaint (R. 16).

Upon receipt of the above complaint, the respondent filed with the petitioner a pleading which it designated as a "Special Appearance and Answer" (R. 982 to 986), under which the respondent appeared and answered the complaint, with full reservation of its objections to the jurisdiction of the petitioner.

The respondent, in its answer, denied the averments of the complaint that the respondent was engaged in interstate commerce and denied that its activities constituted "a continuous flow of commerce among the several states," although admitting that a substantial portion of its raw materials and finished products were shipped to and from the respondent's plant in interstate commerce (Para. 2 of Answer). The respondent admitted that it had discharged and demoted the individuals named in the complaint, but denied that it had done so because of their union membership or activities, averring on the contrary that the individuals named had been discharged and demoted because of inefficiency, violation of the Employer's rules, conduct of the delinquent individual which endangered his fellow-workmen, or other causes which made it necessary for the respondent to dismiss the men discharged, and would have necessitated the discharge or dismissal of any other man in the re-

spondent's employ who had been guilty of the same offense or inefficiency (Para. 4 and 5). In addition, the respondent denied that it was guilty of any unfair labor practices within the meaning of the National Labor Relations Act; denied that it had discriminated against the individuals named by reason of their union membership; and denied that it was discouraging membership in the labor organization named in the complaint. Respondent also denied that any of its acts burdened or obstructed interstate commerce or the free flow thereof, or otherwise affected interstate commerce, or constituted unfair labor practices affecting interstate commerce, within the meaning of the National Labor Relations Act (Para. 6, 7, 8 and 9 of Answer, R. 982 to 986).

For an affirmative defense to the complaint of the National Labor Relations Board, the respondent averred that the National Labor Relations Board was without jurisdiction over the respondent or its activities or the subject matter of the complaint, and that the National Labor Relations Act, pursuant to which the Board was acting in the premises, was unconstitutional and void, in so far as it was sought to be applied to the respondent. In this connection, the respondent averred that the complaint was insufficient in law; that the National Labor Relations Act, and particularly the provisions thereof under which the complaint was issued, were void and of no effect in that they violated the Constitution of the United States, and particularly Article V of the amendments thereto; that the National Labor Relations Act was invalid and void in that it denied respondent the right of trial by jury in violation of the Constitution of the United States, and particularly Article VII of the Amendments thereto; that the National Labor Relations Act was invalid and void in that it was contrary to decisions of the Supreme Court of the United States and that the Board in assuming jurisdiction

to hear the complaint was acting unlawfully and in defiance of these decisions and the Constitution of the United States; that the National Labor Relations Act was invalid and void in that it purported to confer judicial power upon the Labor Relations Board in violation of the Constitution of the United States, and particularly Section I and Section II (1) of Article III; that the National Labor Relations Act was invalid and void because it constituted an arbitrary and unreasonable interference with the respondent's freedom of contract; that the transactions described in the complaint were not subject to regulation by the Congress of the United States through the National Labor Relations Act, or otherwise; that the National Labor Relations Board had no jurisdiction over controversies between the respondent and its employees in that such matters did not affect interstate commerce and were, therefore, not subject to the National Labor Relations Act; that the National Labor Relations Board, having taken an active part in the institution of the proceedings, was disqualified from purporting to exercise a judicial function in the premises; and that the National Labor Relations Act, under any construction consistent with the provisions of the Constitution, could have no application to the respondent or its relations with its employees (Para. 10 of the Answer).

After the foregoing special appearance and Answer had been filed, the National Labor Relations Board proceeded to entertain the complaint and to hear evidence on the matters therein set forth. Because of the respondent's objections to the jurisdiction of the Board, the issue of jurisdiction was first heard and evidence was presented by the Board and the respondent concerning the question of the constitutionality of the National Labor Relations Act and its application to the respondent. At the close of that evidence, the respondent, con-

sistent with its special appearance in the hearing, moved to dismiss the complaint on the ground that the facts showed that the National Labor Relations Board had no jurisdiction to hear or determine the matters alleged in the complaint. This motion, having been denied by the Board, the respondent, in accordance with its special appearance, withdrew from active participation in the hearing. Subsequently the Board, after hearings in Pittsburgh and a joint hearing in Washington (involving other companies) rendered its decision and, before the respondent had received notice of the decision, filed a petition for enforcement of its order in the United States Circuit Court of Appeals for the Fifth Circuit. The jurisdiction of the Court was based on the fact that the respondent was qualified to do business in Louisiana.

2. Facts Relating to the Nature of the Respondent's Operations.

The respondent is a Pennsylvania corporation, with its principal office in Pittsburgh, Pennsylvania (Board's Exhibit 3). It is engaged primarily in the business of manufacturing iron and steel in plants situated in the vicinity of Pittsburgh (Board's Exhibit 4). The transactions covered by the complaint of the National Labor Relations Board related solely to the discharge of certain employees, who had been employed by the respondent in its plant at Aliquippa, Pennsylvania (R. 13, 14). *This is the decisive factor in the case.* Although the National Labor Relations Board offered and received evidence relating to a multitude of other activities of the respondent and other employers and employees, *an examination of the complaint will show that the only substantial question involved is the propriety of the discharge and demotion of thirteen employees who were unquestionably engaged in aiding the respondent's man-*

ufacturing activities in the Aliquippa works (R. 33 to 41). Two of the employees were motor inspectors; one was a tractor driver; three were crane operators; one was a washer in the coke plant; and three were laborers (Decision, R. 33 to 40). Three other employees were mentioned in the complaint, but the complaint was withdrawn as to one of them and no evidence was heard or action taken as to the other two.

The respondent's Aliquippa plant is situated in a community of approximately 30,000 persons, which is located about fifteen miles below Pittsburgh on the banks of the Ohio River (R. 341). The plant in question contains complete facilities for the production of finished and semi-finished iron and steel products from raw materials (Board's Exhibit 4). A substantial investment in lands, plants and equipment is involved (Board's Exhibit 4). The Aliquippa works consists primarily of a by-product coke plant for the production of coke; blast furnaces for the production of pig iron; open hearth furnaces and Bessemer converters for the production of steel; blooming mills for the reduction of steel ingots into smaller shapes; and a number of finishing mills, such as structural mills, rod mills, wire mills and the like. In addition there are other buildings, structures and equipment, storage yards, docks, and an intra-plant railroad system. Approximately 10,000 employes are engaged in carrying on the operations at the Aliquippa plant (R. 31).

For the most part, the respondent's operations at the Aliquippa works are carried on in two distinct stages, the first being the conversion of raw materials into pig iron and the second being the manufacture of semi-finished and finished iron and steel products. In both cases, the operations result in substantially changing the character, utility and value of the materials

wrought upon, which is apparent from the nature and extent of the processes to which they are subjected.

In the first state of respondent's operations, the principal raw materials used are iron ore of varying grades and descriptions, coal, limestone and other less important materials (R. 82). The iron ore is procured from mines in Minnesota and Michigan and is transported over the Great Lakes to the lower lake ports (R. 99). A subsidiary of the respondent is engaged in the business of lake transportation and transports approximately 25% of the ore used by the respondent at its various plants, as well as ore belonging to other manufacturers (R. 123). The ore is taken from the docks on the lower lake ports by independent rail carriers and shipped to the respondent's plant at Aliquippa (R. 85), where it is stored in stock piles for future use (R. 84). The amount of ore in storage varies with the season, but there is usually enough ore on hand to maintain operations from nine to ten months (R. 121). Coal is procured from the mines of Vesta Coal Company, a subsidiary of the respondent, situated in Pennsylvania (R. 85), and is transferred by barge from the mine to the respondent's plant at Aliquippa where it, like ore, is stored for future use (R. 121). Approximately two to three months' supply of coal is always on hand (R. 121). Limestone, which is another important raw material, is obtained in Pennsylvania and West Virginia (R. 85), and is shipped, by independent rail carriers (R. 85), to respondent's plant at Aliquippa, where it is stored. The amounts of limestone usually on hand are probably sufficient to operate the blast furnaces for a few weeks (R. 108).

In the first step in respondent's operations, coal is withdrawn from storage, prepared and converted into coke in by-product coke ovens (R. 86). The coke resulting from the operation is not sold but is used in

subsequent operations (R. 86), which is also the case with respect to some of the by-products (R. 86). Other by-products, principally chemicals, are from time to time sold (R. 86), but there is no evidence as to the ultimate disposition of these by-products. The coke is used in the blast furnaces, with ore and limestone to produce pig iron (R. 82). The scrap metal used in the manufacture of steel is obtained from operations and not purchased (R. 90).

The respondent's operations up to this point are not carried on with reference to any preexisting orders or specifications, although, of course, the amount of pig iron produced does reflect the existing and probable future demands of the market (R. 86). Although differing grades of pig iron are produced, there is no endeavor to manufacture according to particular customers' specifications.

The second stage of respondent's operations consists of the conversion of pig iron into steel and the fabrication of finished and semi-finished steel products (R. 86). To a large extent, the second stage is determined by the orders and specifications of customers, although a portion of respondent's products is manufactured for stock (R. 86).

The pig iron is transported from the blast furnaces to a mixer and then, with scrap, ores and various metals, converted into steel in the open hearth furnaces or by the Bessemer process (R. 82). The steel ingots which result from this operation are then placed in soaking pits to obtain an evenly distributed heat and cut down into shapes and sizes suitable for further fabrication in the blooming mill (R. 83). After this operation is completed, the resulting blooms, slabs, billets and bars (which are sizes and shapes produced by the rolling operations of the blooming mill) are either sold or subjected to other manufacturing processes in the various

finishing mills, where pipes, structural shapes, tin plate, rods, wires, tubes and a variety of products are made (R. 82).

The greater portion of the respondent's production of semi-finished steel is used by it in subsequent operations, but some is sold to other manufacturers, principally in the Pittsburgh district (R. 88) within the State of Pennsylvania. Of the finished products, a portion is carried in stock, but the greater percentage is immediately shipped by barge or railroad to customers (R. 87). In some instances finished and semi-finished products are shipped by barge or rail to warehouses in a number of localities and then shipped from there to customers (R. 107). By far the greater portion is handled by rail carriers (R. 87). It is admitted that probably 75% of respondent's finished products is normally transported to states other than the State of Pennsylvania (R. 88).

The respondent does not own or operate any railroads but does control a subsidiary corporation, which operates an intra-plant railroad, at Aliquippa. This railroad receives cars from independent rail carriers and moves them about the respondent's plant (R. 100). It likewise delivers cars containing finished products at the plant to independent carriers for shipment to customers (R. 100, 101). The respondent also owns a number of barges and a subsidiary corporation, Vesta Coal Company, owns and operates tow boats for hauling barges laden with coal, and in some cases with manufactured products (R. 120).

The Board attached great significance to the fact that within the last year the respondent claimed a so-called "transit privilege" which entitles a shipper of unfinished material to stop it in transit for further fabrication and then continue the shipment, under a through tariff (R. 367). It appears that the respondent

has used this privilege to a limited extent for the purpose of transferring rough castings to its Pittsburgh works for further manufacturing operations (R. 381), but there was no evidence as to the point of destination (R. 390, 391).

3. Facts Relating to the Discharges and Demotion of Employees.

As the summary of the pleadings and procedure has indicated (*supra*, pages 3 to 7), the gravamen of the complaint against the respondent was that it had discharged or demoted thirteen production employees at its Aliquippa plant, because of their alleged union activities. In other words, although the petitioner was nominally the plaintiff, as well as the judge, the real parties in interest were the thirteen employees who were represented by the Board. Practically all of the factual evidence in the case (except that which dealt with the nature of the respondent's business) related to the circumstances surrounding the relations of these employees with the respondent. The petitioner has not reviewed this evidence in its brief, because it considers that only questions of law are now before the Court. On the other hand, there is good reason to hold that these facts are most important to a decision on the constitutional issues, because they show how tenuous is the connection between the movement of interstate commerce and the transactions which were probed and determined by the petitioner. More than that, they are striking proof that the provisions of the Act which the Board has sought to impose upon the respondent are a continuing menace to its freedom of operations and contract.

After the evidence as to the nature of the respondent's operations had been received, the respondent, con-

sistently with its special appearance in the case and because of the known hostile attitude of the Board towards employers, and particularly towards those who insisted upon the preservation of their constitutional rights (see *infra*, pages 41 and 42) withdrew from further participation in the hearing and did not offer any evidence on the merits.

The procedure for hearing which the National Labor Relations Act provides does not require the application of the rules of evidence prevailing in courts of law or equity and the petitioner, in this case at least, has accepted this as a license to let down the bars to every conceivable kind of highly prejudicial, irrelevant and irresponsible evidence. Hearsay, rumor, suspicion and unqualified opinion were received in the course of the hearings and given full consideration in the petitioner's decision. The respondent was blamed for the activities of local police authorities (see *e. g.*, R. 139) and of other persons who had no connection with the respondent, except in the biased opinion of hostile witnesses (see *e. g.* 169, 170; 356). Transactions which occurred long before the enactment of the National Labor Relations Act were probed and used against the respondent. It is noteworthy that much of the testimony which dealt with events occurring before the Act was heard by the National Steel Labor Relations Board (R. 141, 212 and 360) under previous legislation (Public Resolution No. 44) and the respondent exonerated by the findings of that authority. Strikes in the steel industry and elsewhere, occurring within the last quarter century, were examined and abuses were brought to light, for which the respondent was in no way responsible, but which nevertheless contributed to its prejudice in the eyes of the petitioner. Injunctions granted by Federal Courts in labor controversies came in for their share of criticism (R. 469, 470) and the Board was outspoken in its

antagonism towards lawyers and courts and their constitutional doctrines.

An employee of the Pennsylvania Department of Labor was allowed to testify as to charges made against the respondent which were found in affidavits filed with the Department *before* the enactment of the Labor Act, as though they were the established truth (R. 597, 607). The witness pointed out that the charges in these affidavits were serious enough to warrant reference to the then existing National Steel Labor Relations Board (R. 607) but failed to mention that the decision of that Board, in a subsequent hearing, was favorable to the respondent.

In short, the only material evidence was that which dealt with the disciplinary action complained of, and even there the petitioner proceeded upon hearsay, rumor and suspicion and the wildest surmise. It assumed the attitude that every discharge was presumptively wrongful, leaving with the employer the burden of justification, so that if the Board considered that the employer had acted too hastily or too severely, or in disregard of seniority, a violation of the Act would be necessarily involved. Considerations of safety, efficiency and discipline were inconsequential if, in the petitioner's opinion, the employer did not have an ironclad case to back up every disciplinary move. A brief review of the individual cases which were heard by the Board will indicate the actual scope of the issues and the petitioner's attitude towards employers.

Martin Gersner, a motor inspector, was discharged because a nut fell off a crane which he was supposed to have inspected (R. 159). He was so little interested in his employment that he did not bother to look for the nut (R. 159). His real excuse for complaining against the action of the respondent is that others who

have been guilty of similar offenses over the past several years received lesser penalties (R. 152, 153).

Harry Phillips, also a motor inspector, left his job to eat his lunch, to visit the wash house and to smoke a cigarette (R. 173). He was called for duty twice and failed to answer (R. 173). Then upon being reprimanded he lied to his foreman by stating that he did not hear the first whistle and explained his failure to respond to the second, by the statement that he was in the wash house (R. 173, 174).

Angelo Razzano, a tractor driver, thought he had to work too hard in the respondent's plant (R. 178). He was laid off a week for scratching a machine (R. 184) and complains that he was given other work when his tractor was idle (R. 185). He was fired for failing to close a door (R. 182), in violation of a rule which was established to protect the men working in the mills from the cold weather outside (R. 190). He says that other people have been remiss and were not discharged.

Ronald Cox, a craneman, was discharged because he started his crane, without testing the limit stops (R. 204). He admits that the limit stops are important because they prevent the crane from rising too high and dropping its load on the working floor (R. 205). His excuse for violating the instruction of his foreman is that he knew better than the foreman what was the proper method of testing the limit stops (R. 205). The learned member of the Board in his question encouraged the violation of the foreman's orders, where the employee thinks that the foreman is in the wrong (R. 205). Cox, in testifying for himself, admitted that he did not take the question of his discharge up with the higher officials and that he refused the assistance of an employee representative (R. 206, 207).

Martin Dunn, a crane operator, complained of discrimination before he was discharged, on the ground

that he got only one or two days' work a week while others received more (R. 234), but when he came to estimate his wages, for purposes of recovery under the Act, he stated that he was getting five days a week before his discharge (R. 235). Some time before his discharge, he claimed he was not getting enough work and his foreman granted a transfer to the labor gang where more work was available (R. 234). The same foreman brought him back to a crane. In June, 1935, he was suspended for ten days as a disciplinary measure (R. 222). He was discharged for leaving the key to the safety lock to his crane on the bench beside the crane (R. 229).

Dominic Brandy, a coal washer, likewise complained that prior to his discharge he did not receive as much work as the other men (R. 251), but when it came to estimating the amount of his recovery under the act, he considered that he had worked five days a week for five months before his layoff (R. 264-265). Again a member of the Board encouraged the witness to vilify the Company (R. 268). He was laid off in August, 1935, because when a sample of his work was taken, it was found that the coal had not been properly washed and that there was an excess of slate present. In November he was discharged because another bad sample was found (R. 259-262).

Eli Bozich was laid off one week in September, 1935, because he left his job before it was finished. His excuse was that others were similarly neglectful (R. 272). Later he received a two weeks' layoff for not reporting to work but says that he was not instructed to appear (R. 273). He was finally discharged for standing idle after he had finished a particular piece of work (R. 280). He says that other workers who loafed on the job have gotten away with it (R. 281).

Royal Boyer, a nail maker, was transferred to the nail department at his own request so that he could earn more money. He was laid off in October for two weeks because he put good nails in a buggy which contained bad nails (R. 291), which he admitted was probably his fault (R. 292). He was discharged subsequently because ten pounds of bad nails were discovered in the buggy which he filled as he worked (R. 285). Although he thinks that someone else put them there, the buggy was by his side and the inspector discovered the bad nails while it was being filled (R. 288). He also says that other workers on occasion made bad nails (R. 290).

George Marrol, a machinist's helper, was put on a hydraulic drill press in December, 1935, and was discharged for bad work. He admits the work was bad but blames the Company for putting him on a press which was difficult to operate (R. 308). He points out that other members of the crew were not put on this press but admits that they too were members of the union (R. 311). His employment record indicates that he was satisfactory from the standpoint of punctuality and other qualifications but was hopeless as to ability (R. 314).

Angelo Volpe was a foreman from 1921 to 1930, when he was demoted because he would not work on Easter Sunday (R. 320). He was transferred from the labor gang to a crane in another mill at his own request so that he could earn more money (R. 320). He was laid off in April, 1935, because he lifted badly loaded pipe, which might have fallen from its sling and injured someone (R. 321, 322). He says that the person who loaded the pipe was at fault (R. 322). He was reprimanded by a state inspector for making the lift on an improper signal from the loader and given a 15-day lay-off (R. 323), but argues that other crane operators

frequently violated the rule (R. 324). He was finally discharged because he lifted a load without a signal and struck a fellow workman (R. 330).

What can be done to preserve efficiency and discipline if the Board is to substitute its unqualified judgment for that of the employer in cases such as these? Must an employee be criminally careless to justify discipline or a discharge? Perhaps some of the faults that led to disciplinary action may seem insufficient to the Board, but how can it usurp the function of deciding a question such as that, especially where other considerations of authority and morale may be involved? Of tangible evidence of union discrimination there was none. Some of the witnesses rely on the fact that the respondent's agents knew of their union affiliations, but how could men working in the same plant, in the same community, help but know it. Others base their charges on expressions from foremen which may have been derogatory to the union, but how may the respondent control the thoughts of five hundred foremen? Some of the witnesses "felt" that they were being treated unfairly, but how could that be of any value to a decision on their cases. The petitioner may have believed that discrimination is not easy to prove and that unreliable guesswork must therefore be substituted for relevant evidence. If that be true, it merely emphasizes the fact that the labor act and the administrative proceedings which it has created for the purpose of sitting in judgment on the employer's right to discipline are living threats to his freedom.

4. Hypothetical Evidence.

There was no proof that the respondent's operations had been interrupted by a strike, or that the efficiency of its operations had been in the slightest respect impaired or hampered by the discharge of the complaining witnesses. Petitioner, however, offered and received in evidence a great variety of documentary and other evidence, including a miscellany of economic and political opinions, none of which seemed to have any actual relevancy to the issues of the case. This hypothetical evidence covered such a wide field and embraced so many subjects that it is almost impossible to give an intelligible abstract of its content. It ranged from magazine articles (see *e. g.* Board's Exhibits 25 to 35), newspaper clippings (Board's Exhibit 36) and the testimony of newspaper readers (R. 396) through numerous abstracts and summaries of doctorate and other theses on labor relations in general (see *e. g.* Board's Exhibits 70, 71, 92, 94, 95) to a best seller 'Steel Dictator," (R. 898) and comments by Judge Gary, following the 1892 strike. The petitioner took judicial notice of collegiate theses, as well as public records. Some of these documents pretended to be factual reports, but many were admittedly expressions of opinion.

In the hearings which were conducted at Pittsburgh and which involved the actual discharges, the petitioner made some effort to adhere to ordinary standards of relevancy, but at the later hearing in Washington, the bars to irrelevant and prejudicial material were entirely dropped. It is significant that at this latter hearing the respondent's case was combined in a joint hearing with the cases of Wheeling Steel Corporation and Crucible Steel Company, with evidence being admitted in bulk against the three employers, without regard to dissimilarities in their position.

The Board's evidence in Pittsburgh established that the respondent was a well integrated steel company, ranking about fourth in the industry. It was also shown that the industry in general was of substantial character, that its functions were important to the nation at large, and that the use of steel in other industries was widespread. Evidence was also offered to show that strikes had occurred in the industry, resulting in slackening of operations, or at least a transfer of the bulk of business from non-operating to operating units. Witnesses expressed the opinion that future strikes in the industry might affect other businesses, such as the manufacturers of automobiles and the railroads, because of the widespread use of steel. The 1919 strike was dwelt upon, although the respondent's operations were not affected by it (R. 267).

It is clear, from the Board's own procedure, that all of this was pure speculation. If the evidence had been merely irrelevant, it would not be worth mentioning. A more serious complaint is that evils in other branches of the industry and in other industries were used to blacken the reputation of the respondent. This unfortunate admission of highly prejudicial and immaterial testimony was carried to greater lengths in the joint hearing in Washington. A number of alleged experts appeared before the petitioner and embellished the record with the labor histories of the printing industry, the automobile industry, the rubber industry, the lumber industry, the railroads and the Pullman Company. The virtues of the closed shop in the printing and garment trades were praised and the lack of organization in lumber mills condemned, with a word of laudation for the I. W. W. Unfair practices in other industries, such as the "black list", were dwelt upon and no doubt the petitioner's indignation at these disclosures was in part visited upon the respondent. Some of the experts not

only spoke of their own beliefs, but asserted the right to speak for all of the experts in the field.

It is a defiance of reason and good judgment to argue that guesswork evidence of this character can bridge the distance between the discharge of thirteen employees and the movement of interstate commerce. It may have proved that some economists believe that the unionization of industry on a national scale is desirable for the nation at large, or that the experts are not satisfied with our constitutional system, but it does not show that the respondent's relations with its production employees have any direct bearing upon interstate commerce. Perhaps its object was to establish that unionization would be conducive to efficiency in the respondent's plants, but the materiality of such a conclusion, even if it were sound, is difficult to perceive.

5. The Decision of the Board.

In the last analysis, the substance of the decision was that the respondent must reinstate ten discharged employees, with compensation for time lost during their period of unemployment. However, in certain respects, the decision went beyond this by making negative orders, requiring the respondent to cease and desist "from interfering with its employees in their Union activities and from discouraging membership in the Union by discrimination in regard to hire or tenure of employment". These negative restraining orders were based upon the same state of facts, that is, the discharges of the ten complaining witnesses, which are designated as "unfair labor practices" in the decision of the Board (R. 33 to 42).

Finally, the Board has ordered the respondent to take affirmative action in posting "notices to its employees in conspicuous places in each shop and yard of

the Aliquippa Works, stating (1) that the respondent *will not discharge* or in any manner discriminate against members of, or those desiring to become members of, Beaver Valley Lodge No. 200, Amalgamated Association of Iron, Steel and Tin Workers of North America, or persons assisting said organizations or otherwise engaging in Union activities * * *". (R. 45) This most unusual direction will receive comment at another point.

SUMMARY OF THE ARGUMENT.

The respondent contends that the National Labor Relations Act is, in reality, a regulation of labor relations, and not of interstate commerce, and that, as a consequence, it is not within the power of Congress to enact. Even if it should be considered a true regulation of interstate commerce, it still has no application to the respondent's relations with its production employees, because they are not subject to regulation by the Federal Government. In addition, the provisions of the Act which the petitioner seeks to apply in the present case are invalid, because they violate Section 2 of Article III of the Constitution, as well as the Fifth and Seventh Amendments to the Constitution.

The respondent is a corporation engaged in the manufacture of iron and steel products. In this connection, it owns and operates a large steel plant at Aliquippa, Pennsylvania, in which are employed approximately ten thousand men. The present case is, in reality, a controversy between ten individuals who were formerly employed by the respondent in production work at this plant, and the respondent. These individuals, with three others, filed a complaint with the petitioner, the National Labor Relations Board, charging that they had been discharged or demoted by the

respondent because of union affiliations. The respondent objected to the jurisdiction of the petitioner, but its motion to dismiss was overruled and the petitioner, after hearing, determined that the complainants had been wrongfully discharged and ordered their immediate restoration, with compensation for lost pay.

POINT I.

The Findings of the Petitioner on Jurisdictional Issues Are Subject to Review.

The petitioner has endeavored to justify its assumption of jurisdiction over the respondent's employment relations, by making a finding that the respondent has engaged in unfair labor practices "affecting commerce" within the definition of the National Labor Relations Act. The respondent insists that the facts upon which this "finding" pretends to be based are, *in law,* insufficient to justify any such conclusion, and that this court is entitled to reexamine the facts for the purpose of determining the jurisdictional issue. The findings of fact of an administrative agency, such as the petitioner, on constitutional or jurisdictional issues, are not conclusive. *Crowell v. Benson,* 285 U. S. 22 (1932); *St. Joseph Stock Yards v. United States,* 298 U. S. 38 (1936).

POINT II.

The National Labor Relations Act Can Have No Application to Transactions Between the Respondent and Its Production Employees.

A.

THE NATIONAL LABOR RELATIONS ACT IS NOT A TRUE REGULATION OF INTERSTATE COMMERCE.

1. The problem of measuring the constitutional validity of the National Labor Relations Act is simplified if the inquiry pays true heed to the literal requirements of the Constitution. The power of Congress is clearly defined by the Commerce Clause of the Constitution and considerations of political expediency have no weight in fixing the dividing line between the powers of Congress and the reserved powers of the several States. The argument of the petitioner is, in the last analysis, a plea that, from an economic standpoint, Congress *should* have power to apply its legislation to the respondent's employment relations. This, we submit, is entirely beside the point, if the exercise of such power would run counter to the Constitution.

The jurisdiction of Congress, under the commerce clause of the Constitution, includes the power to regulate, restrict and protect interstate commerce, but it does not include, and was not designed to include, the right to use such jurisdiction as a pretext for legislation which interferes with the local sovereignty of the separate States. Since *Gibbons v. Ogden,* 9 Wheat. 1 (1824), this Court has adhered to the principle that while Congress has power over the movement of persons and commodities among the several States, it has no jurisdiction to regulate activities which may precede or follow, but are not, commerce. The use of an admitted power of Congress as a pretext to interfere

with local activities which are not subject to its jurisdiction, is to be condemned. The commerce clause will not serve as an excuse for legislating with respect to labor relations, which do not constitute a part of interstate commerce.

2. The legislative history of the National Labor Relations Act and its substantive provisions are sufficient to demonstrate that the Act, although disguised as a regulation of interstate commerce, is, in actuality, a regulation of labor. The terms of the statute apply to *almost every employer and every employe* (Section 2), although the jurisdiction of the petitioner to enforce it is somewhat circumscribed.

The provisions of the statute, if carefully analyzed, will indicate that Congress is primarily concerned with the protection and establishment of labor organizations. The provisions condemning plant unions and sanctioning "closed shop" agreements, bear no reasonable relation to interstate commerce. Similarly, the express preservation of the right to strike indicates that Congress was not interested in preventing interruptions to the movement of commerce. The interference with the employer's discretion to hire and fire is another reason for believing that efficiency in the shipment of products in interstate commerce has not been the object of the statute.

3. Congress has endeavored to save the statute from the taint of invalidity by confining its enforcement to transactions "affecting commerce", which the Act defines as transactions which burden commerce *or lead or tend to lead to a labor dispute* which burdens commerce (Section 2). Despite this limitation on the enforcement of the Act, the substantive provisions make no such exception and are, in fact, broad enough to cover almost every employment relation (Section 2).

The petitioner has followed the same involved line of reasoning in endeavoring to "find" that the respondent's operations "affect commerce". Like Congress, it has found itself faced with the task of piling premise upon premise and hypothesis upon hypothesis to reach the conclusion that the discharge of a few production employees at the respondent's plant has a vital bearing upon the movement of interstate commerce. We submit that the ultimate fact remains that Congress has enacted a labor law, and not a regulation of commerce, and it does not help to sustain the pretext that there may be an indirect connection between the two. *Carter v. Carter Coal Company et al,* 298 U. S. 238 (1936).

B.

THE NATIONAL LABOR RELATIONS ACT CAN HAVE NO APPLICATION TO THE RESPONDENT'S RELATIONS WITH ITS PRODUCTION EMPLOYEES.

1. Although the respondent purchases raw materials, which have a point of origin in other States, and ships a large portion of its finished products across State lines, its production activities, including its employment relations, are not thereby subjected to the jurisdiction of Congress. *Howard v. Illinois Central Railroad Co.,* 207 U. S. 463 (1908). There is no logical or legal connection between the respondent's limited participation in interstate commerce and the union affiliations of its production employees. *Adair v. United States,* 208 U. S. 161 (1908); *Hammer v. Dagenhart,* 247 U. S. 251 (1918); *Railroad Retirement Board v. The Alton Railroad Company et al.,* 295 U. S. 330 (1935) *supra.*

2. The principle which impeaches the validity of the National Labor Relations Act, viz., that Federal power over interstate commerce *must* be confined to

bona fide regulation of the movements of commerce, likewise prevents the application of the statute in the present case. An unbroken line of decisions under the commerce clause has established that manufacturing and production activities are not in or a part of interstate commerce, even though they may be preceded or followed by the movement of materials between States. *Arkadelphia Milling Co. v. St. Louis & Southwestern Railways Co.*, 249 U. S. 134; *Oliver Iron Co. v. Lord*, 262 U. S. 172 (1923); *Industrial Association v. United States*, 268 U. S. 64 (1925). Although most of the decisions have dealt with the police or taxing powers of the States, they are based upon the fundamental principle that manufacturing activities are subject to the exclusive jurisdiction of the separate States.

The distinction between the local manufacturing activities of a business and its subsequent or precedent participation in interstate commerce has been maintained in the field of labor relations. *Hammer v. Dagenhart*, 247 U. S. 251 *supra; Industrial Accident Commission v. Davis*, 259 U. S. 182 (1922). Even though an employee may be employed in indirectly assisting the movement of products in interstate commerce, his relationship to his employer is a status existing wholly within the State, whose incidents, such as wages, hours of labor and the like, are purely domestic in character. *Carter v. Carter Coal Company et al*, 298 U. S. 238 (1936).

Congressional regulation of the labor relations of interstate carriers furnishes no precedent for the present Act. Because interstate carriers are instrumentalities of the movement of commerce, and because they are public utilities, Congress has subjected them to an exhaustive scheme of regulation, of which the labor legislation is merely an incident. As a result, the decision in *Texas & New Orleans Railroad Co. v. Brother-*

hood of Railway & Steamship Clerks et al, 281 U. S. 548 (1930) is not controlling.

3. Decisions, such as *Stafford v. Wallace,* 258 U. S. 495 (1922) and *Chicago Board of Trade v. Olsen,* 262 U. S. 1 (1923), which sustain Federal regulation of Stockyards and Grain Exchanges, have no application to the present case. Grain Exchanges and stockyards are instrumentalities of interstate commerce in much the same sense as the actual carriers of interstate commerce. They are focal points through which the stream of commerce in grains and cattle sweeps on its way from producer to the ultimate consumer. The activities which were regulated in both cases were activities in the stream of commerce and exerted a direct effect upon its flow. Neither case sanctions the extension of the doctrine to production activities which may indirectly affect the stream of commerce. *Carter v. Carter Coal Company et al.,* 298 U. S. 238 *supra.*

4. The petitioner relies upon decisions which have upheld the application of the Anti-Trust Laws to industrial conspiracies, such as *Coronado Coal Company v. United Mine Workers,* 268 U. S. 295. These were cases involving conspiracies to restrain interstate commerce by means of local combinations. The element of an *intentional* interference with the movement of interstate commerce was essential in these cases, not only because an intent to restrain commerce was a part of the proscribed offense, but also because the existence of such an intent made the effect on interstate commerce necessarily direct. This is shown by a comparison of the first Coronado case (*United Mine Workers v. Coronado Coal Co. et al,* 259 U. S. 344 (1922)), where there was no intent, with the second (*Coronado Coal Co. v. United Mine Workers,* 268 U. S. 295, *supra*), where there was both direct and inferential evidence of

intent. (Cf. *United Leather Workers v. Herkert & Meisel Trunk Co.*, 265 U. S. 457 (1924)).

The petitioner's efforts to show an intentional restraint in the present case are futile. Even if a strike should occur at the respondent's plant, the respondent could not be held responsible for the *voluntary* intervening act of outside agencies. The suggestion that the respondent might be charged with an implied intent to destroy interstate trade, if a labor dispute should occur, is obviously unsound.

The conspiracy cases, such as *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, *supra*, and *Local 167, etc. v. United States*, 291 U. S. 293 (1934), although primarily concerned with the application of the Anti-Trust Laws, prove the fallacy of the petitioner's argument, because they establish that Congress *cannot* regulate local transactions or relations unless they exert a *direct* effect on interstate commerce. The definition of "affecting commerce" in the National Labor Relations Act is a confession of the indirectness of the connection between the respondent's labor relations and the movement of interstate commerce. See *Schechter Corporation v. United States*, 295 U. S. 495, *supra; Industrial Association v. United States*, 268 U. S. 64 (1925). The petitioner calls attention to the fact that strikes may and frequently do produce an inhibitory effect on the movement of interstate trade to and from the affected area. This is the fundamental error in the petitioner's argument, in that it assumes that it need only establish the connection between strikes and the stoppage of commerce. There has been no strike or labor dispute in the present case. In actuality, the petitioner means that the respondent's discharge of ten employees *might* have led to dissatisfaction, which *might* have led to a labor dispute, which *might* have led

to a strike and a consequent interruption of interstate commerce.

The findings of Congress that discriminatory discharges may lead to an interruption of commerce, are unavailing. A declaration by Congress of the need of regulation will not automatically justify its action, where its legislative findings run counter to established rules of construction, which hold that there is no necessary and direct connection between the relations of an employer and his employees and the movement of interstate commerce. In this respect, the present case is clearly controlled by the decision in *Carter v. Carter Coal Co.*, 298 U. S. 238, *supra*.

There are dangerous implications in the petitioner's argument. If it be accepted, there would be no reason why Congress should not use its power over interstate commerce as a pretext to stifle the sovereignty of the States. We therefore believe that the Court will not suffer the powers of the States to be whittled away by a statute which piles speculation upon speculation to attain its ends. *United States v. Butler et al*, 298 U. S. 1; *Schechter Corporation v. United States*, 295 U. S. 495, *supra*.

POINT III.

THE PROCEDURAL PROVISIONS OF THE ACT VIOLATE SECTION 2 OF ARTICLE III OF THE CONSTITUTION AND THE SEVENTH AMENDMENT TO THE CONSTITUTION.

The National Labor Relations Act confers upon the petitioner *exclusive* original jurisdiction over controversies between an employee and his employer as to the propriety of the employee's discharge, and the Board is authorized to render affirmative relief to the employee, including the restoration of his employment and

compensation for lost wages. The findings of fact of the Board are conclusive and only objections made before the Board will be heard. The act does not make any provision for a trial *de novo* in the constitutional courts on constitutional or jurisdictional issues.

We submit that the Act is invalid because it authorizes the Board to award a money judgment, depriving the employer of his right to trial by jury in cases involving more than twenty dollars. If, as the petitioner contends, the action before the Board should be considered in the nature of a suit in equity, with authority in the Board to award a mandatory injunction restoring employment, with incidental damages for back pay, then the Act violates the provision of Article III of the Constitution, for it deprives the constitutional courts of their authority to try constitutional and jurisdictional issues.

The present case presents a controversy between employees and the respondent, in which the petitioner has directed the restoration to employment of the complaining employees, with back pay. This being the case, it is a controversy between private citizens, enforcing private rights. The failure to provide means for a trial *de novo* of jurisdictional issues in such a case is fatal. *Crowell v. Benson,* 285 U. S. 22 (1932).

The proceedings of the Board are not comparable to those of the Federal Trade Commission, for the latter acts only in the public interest, where the United States is, in effect, the plaintiff, and it does not assume the right to enforce or redress private rights. In addition, the Federal Trade Commission does not exercise authority to grant any affirmative relief, but merely enjoins the continuance of unfair competitive practices or of violations of the Anti-Trust Laws. Where private citizens seek relief for damage under such laws, they

are obliged to resort to the District Courts. Cf. *Federal Trade Commission v. Klesner*, 280 U. S. 19 (1929).

POINT IV.

The Provisions of the Act Which the Petitioner Seeks to Apply to This Respondent Are Invalid Under the Fifth Amendment to the Constitution.

A.

THE DECISIONS OF THIS COURT IN ADAIR v. UNITED STATES AND COPPAGE v. KANSAS ARE DETERMINATIVE.

The real issue in the present case is the alleged commission by the respondent of unfair labor practices in the discharge of union employees. Section 8 (3) of the Act, which prohibits discrimination in regard to hire or tenure of employment and which has been applied to the respondent by the petitioner, is an arbitrary and unlawful interference with the respondent's freedom of contract. *Adair v. United States*, 208 U. S. 161 (1908); *Coppage v .Kansas*, 236 U. S. 1 (1914). Section 8 (3) of the Labor Act presents a much greater menace to the respondent's freedom of contract than the enactments which were denied validity in the Coppage and Adair cases, because it does not merely punish discriminatory contracts or discharges, but authorizes the Board to direct the restoration of employment, thereby forcing the respondent to enter into a contractual relationship against its will.

The Adair and Coppage cases are not affected by the decision of this Court in *Texas & New Orleans Railroad Co. v. Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548 (1930). That case did not involve a statutory prohibition against discriminatory discharge, but merely the violation by the carrier of an

order of court which had enjoined interference with the designation of representatives by its employees for purposes of voluntary mediation under the Act. The power of the Court to require the defendant carrier to purge itself of contempt is no precedent for a statute authorizing an administrative agency to require the reemployment of an unsatisfactory employee.

There is another distinction between the facts of the *Texas & New Orleans Railroad Co.* case and the issues of the present case. The former dealt with an interstate carrier, which is a public utility. Congress has always subjected interstate carriers to an exhaustive scheme of regulation and has the right to compel them to continue in business to serve the public. By reason of its power to compel the continuity of interstate movement, Congress might also have the right to require the carriers to employ certain individuals. The respondent is not a public utility and Congress has no authority to compel it to continue its business. It, therefore, has no authority to make it enter into contractual engagements with its employees on terms which are not of its own making. A comparison of *Charles Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522 (1923), with *Wilson v. New*, 243 U. S. 332 (1917) points the distinction. It should also be observed that the mere size of the respondent's operations does not put it in the category of businesses "affected with a public interest." Cf. *Williams v. Standard Oil Co.*, 278 U. S. 235 (1929).

B.

THE PETITIONER'S ORDER CONSTITUTES AN UNLAWFUL INTERFERENCE WITH THE RIGHT OF THE RESPONDENT TO MANAGE ITS OWN BUSINESS.

The law has always been hesitant to interfere in questions of employer-employee relationships. From the standpoint of the employee, the law has recognized that he should not be forced into a relationship which may be distasteful, and from the employer's viewpoint, the courts have held that the right to judge the capabilities of employees is absolutely essential to the efficient management of the employer's business. The question of retaining or discharging an employee involves delicate considerations of discretion which the law is loath to attempt to weigh. The facts of the present case show the dangers of bureaucratic interference, in that each discharge involved some admitted fault on the part of the complaining employee, but the petitioner determined that it was better qualified to decide and that the respondent's action had been too drastic. This is clearly an interference with the normal right of the respondent to manage its own business, because it is a dictatorial usurpation of the respondent's discretion to determine the capabilities of its employees.

Another dangerous implication of the law and of the petitioner's decision is that it confers a kind of civil service status upon union employees, which will inevitably encourage laziness, insolence and inefficiency. This is confirmed by a notice which the petitioner, in its decision, has ordered the respondent to post in its plants, to the effect that it will not discharge members of the union. It would be the equivalent of informing the employees that if they become affiliated with the union, they will be thenceforth immune from discharge.

We submit that the underlying philosophy of the National Labor Relations Act is a constant threat to the respondent's normal right to manage its own business. Not only does the Act provide, in effect, that an unqualified bureau will sit as a higher court over the respondent's employment office, but it also ordains that the respondent *must* deal with whatever union may be selected by a majority of its employees and refuse to negotiate with other employees or their representatives. The power which it delegates to a majority of the employees to bind the minority is arbitrary and unfair and will necessarily lead to the suffocation of minorities and to the closed shop, forcing the employer to herd his employees into an organization which is not of their own choice. This will in turn seriously disturb the discipline and morale of the respondent's employees, with obvious injury to them and to the respondent. (Cf. *Carter v. Carter Coal Co. et al,* 298 U. S. 238, *supra.*)

ARGUMENT.

POINT I.

The Findings of the Petitioner, the National Labor Relations Board, on Jurisdictional and Constitutional Issues, Are Subject to Review by This Court.

The National Labor Relations Act provides, in Section 10 (e), that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive". Again, in Section 10 (b), the statute declares that "rules of evidence prevailing in Courts of law or equity shall not be controlling". It has been suggested in the petitioner's brief that the Board has found that the acts of the respondent in discharging the employees named in the complaint tended to lead to a labor dispute which would burden or obstruct commerce, and therefore, "affect commerce" as a matter of law. Although the petitioner's decision did contain findings which are substantially to this effect, these findings cannot, of themselves, justify the action of the petitioner in assuming jurisdiction over the respondent's industrial relations. We believe that this Court is entitled to cut through the findings of the petitioner and to examine the ultimate facts, and that such an examination will conclusively show that, under accepted principles of constitutional construction, the transactions described in the complaint were, *as a matter of law,* not subject to regulation under the National Labor Relations Act, from which it must follow that the petitioner had no jurisdiction over the respondent or over the subject matter of the controversy.

The decision of this Court in *Crowell v. Benson,* 285 U. S. 22 (1932) entitles the respondent to a reexamination of the facts upon which the jurisdiction of the peti-

tioner is said to depend. In holding that an employer was entitled to a trial *de novo* on a question of jurisdiction under the Longshoremen's and Harbor Workers' Compensation Act, and that the findings of a deputy commissioner, appointed pursuant to the Act, on jurisdictional issues were not binding, the Court said:

> "The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the executive department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law. (p. 57)
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> "In the present instance, the argument that the Congress has constituted the deputy commissioner a fact-finding tribunal is unavailing, as the contention makes the untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence even though a constitutional right may be involved. Reference is also made to the power of the Congress to change the procedure in courts of admiralty, a power to which we have alluded in dealing with the function of the deputy commissioner in passing upon the compensation claims of employees. *But when fundamental rights are in question, this*

Court has repeatedly emphasized 'the difference in security of judicial over administrative action.'" (Italics supplied) (pp. 60-61)

It might well be argued that the National Labor Relations Act is fatally defective because it makes no provision for a trial *de novo* on jurisdictional issues. Although the Circuit Court of Appeals and this Court may review the record which is made before the Board, a mere re-examination of the recorded evidence is in no sense the equivalent of a trial *de novo* and the Act makes no provision for a thorough judicial inquiry into fundamental questions of jurisdiction. But apart from this point, which will be considered later, the existence of a causal connection between the transactions over which the Board assumes jurisdiction in particular cases and the movement of interstate commerce is necessarily a question of law and the constitutional courts may not be deprived of an opportunity to make a determination of the facts upon which the connection is said to depend.

It is no answer to this to contend that the petitioner is a quasi-judicial, rather than an executive agency. If such a contention could grant finality to the petitioner's decisions on issues involving its own right to assume jurisdiction, the constitutional powers of the judiciary would be seriously impaired and the right of a citizen to resort to the constitutional courts for the protection of his rights completely abrogated. This principle has been reiterated in many decisions of this Court and finds its latest expression in *St. Joseph Stock Yards v. United States*, 298 U. S. 38 (1936), in the statement that

> *"When the Legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The Legislature cannot preclude that*

scrutiny or determination by any declaration or legislative finding. Legislative declaration or finding is necessary subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. *Nor can the Legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation.* Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards.

"That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. It is said that we can retain judicial authority to examine the weight of evidence when the question concerns the right of personal liberty. But, if this be so, it is not because we are privileged to perform our judicial duty in that case and for reasons of convenience to disregard it in others. The principle applies when rights either of person or of property are protected by constitutional restrictions. *Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative*

> ***action going beyond the limits of constitutional authority.***" (Italics supplied) (pp. 51-52)

The effect of this principle is that this Court may inquire not only into the reasonableness of the findings of Congress, as expressed in the National Labor Relations Act, but also into the propriety of the petitioner's decision. However much power Congress may have designed to confer upon the National Labor Relations Board as a fact-finding body, it is fundamental that the Board may not lift itself by its own bootstraps and find that it has jurisdiction where, as a matter of law, no such jurisdiction exists. If this were not the rule, fundamental rights would be at the mercy of a subservient administrative agency, and a body such as the petitioner could find its own way into jurisdiction, even where the ultimate facts are *legally* insufficient to support its authority.

The grave consequences which this Court pointed out in the decisions referred to above are perhaps illustrated by the facts of the present case. In one sense, the National Labor Relations Act is itself responsible for the atmosphere of hostility which pervaded the proceedings before the Board, because of the unrestrained powers which it places in the petitioner. The procedural provisions of the Act have constituted the petitioner an investigator, a prosecutor and a judge, at one and the same time. Under Section 11, investigatory powers of the widest character are conferred upon the Board. It is given "access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question." Proceedings against employers may be initiated by the petitioner and it is permitted to sit in judgment on its own complaints. Its agents are sent out to make investigations and its

own attorneys prosecute employers on behalf of the petitioner, while the petitioner endeavors to act as the judge. The widest latitude in conducting hearings is permitted. The rules of evidence pervailing in Courts of law or equity are not controlling, and yet, the findings of the Board on questions of fact are made conclusive. It is true that other agencies, such as the Federal Trade Commission, have similarly wide powers, but they, for the most part, deal with broad questions of public interest, and not individual cases, where the factor of personal relationship is present and where, from the very nature of the case, the hostility and bitterness of a disgruntled employee are apt to intrude.

The determination of the petitioner to reach the conclusion that the respondent was engaged in interstate commerce was evident throughout the hearing. In addition to its natural inclination to extend and strengthen its own jurisdiction (Cf. First Annual Report of the National Labor Relations Board, Page 135) the record bears frequent evidence of the petitioner's antagonism towards employers who have questioned the constitutionality of its asserted powers. The following extracts from questions asked by one of the members of the Board are typical:

> "* * * we are be-set by injunctions and lawyers who come and say that it is a denial of all of the rights of the employers even to allow them to participate in an election to choose their own representative? (page 811)
>
> * * * * * * *
>
> "*Mr. Carmody*:
>
> In view of the fact that the country is full of lawyers that do not believe that these laws ought to be passed, or that they are constitutionally affected, it might be well to get that

list into the libraries of some of our law schools, with the hope that not only economists but lawyers would have some appreciation of the value of a civilized method of dealing with labor relations." (Page 963).

* * * * * * *

"*Mr. Carmody*:

Just one more question. I have been impressed during the past few days of these hearings with statements that practically all of the witnesses made who are expert in this field, that these efforts, that some regularization of employment relationships began in the United States more than fifty years ago, and here we are, after fifty years of effort, and after literally hundreds of millions of dollars have been spent—dollars, of course, that must be paid for by people out of goods of industry—and we are still fighting about the same thing, and we still have employers and their lawyers who maintain that the Government has no right to assist with these relations by the process of negotiation and by requiring that employers deal in a civilized way with employees.

"What do you see ahead? Is it a completely futile thing or is there a tendency to improve this condition?" (Page 967)

POINT II.

The National Labor Relations Act, Under Any Construction Consistent With the Provisions of the Constitution, Can Have No Application to Transactions Between the Respondent and Its Production Employees.

It is the respondent's position that the National Labor Relations Act is, in reality, a labor statute, and not a true regulation of interstate commerce, from which it should follow that the Act is invalid in *toto*. The petitioner contends, however, that the statute may be saved from the taint of invalidity by attributing to Congress the intent to confine its application to situations which Congress may lawfully regulate under the interstate commerce clause of the Federal Constitution. The respondent's argument will therefore be directed to both issues, maintaining with respect to the first that the Act is unconstitutional in *toto*, and, with respect to the second, that it cannot be lawfully applied to the respondent. However, since both issues depend, to a large extent, upon the same considerations, it is impossible to observe a definite line of separation throughout the argument, and we therefore ask that our arguments with respect to the question of constitutionality be considered as bearing, with the same force, upon the question of the lawful scope of the particular provisions of the Act which are in question in this case.

A.

The National Labor Relations Act Is a Labor Act and Not a True Regulation of Interstate Commerce.

Under this aspect of the case it is necessary to make an inquiry into the objects of the National Labor Relations Act, to determine whether it represents an hon-

est endeavor to regulate commerce among the several states, or an usurpation of the reserved powers of the separate states to control questions of internal policy. As a consequence, the question resolves itself into two subsidiary questions, the first dealing with the scope of Congressional power over interstate commerce, and the second with the nature and objects of the statute involved.

1.

THE POWER OF THE CONGRESS OF THE UNITED STATES UNDER THE INTERSTATE COMMERCE CLAUSE OF THE CONSTITUTION IS LIMITED TO THE BONA FIDE REGULATION OF INTERSTATE COMMERCE.

The problem of measuring the constitutional validity of the National Labor Relations Act, in its application to the industrial relations of the respondent, is greatly simplified if the inquiry begins with the Constitution itself and pays true heed to the literal requirements of the document. Much of the dust of controversy which obscures the question of determining the validity of the labor act and similar legislation has been stirred up by arguments and discussions which have lost the true meaning of the constitutional phrase in an effort to remodel our political system on a basis of expediency, by attributing to the central government powers which might be most conveniently exercised from Washington. And as a consequence, the plenary powers of the States, like the Charter on which they rest, are cast aside in an endeavor to reach a theoretically convenient goal. The mass of hypothetical evidence which was received by the Board in its joint hearing in Washington (Statement of Facts, pages 19 to 21), presents a graphic picture of this improper approach to the problem.

Arguments of this character, which advocates of a centralized government habitually employ, may have somewhat blurred the line which lies between the reserved powers of the states and the jurisdiction of the Federal government. More than that, they have a spurious persuasiveness, in that they are apt to distract attention from the fundamental phrase of the Constitution to the political issue of national versus local supremacy. So with the petitioner's brief. Deftly it paints the evils of strikes and lockouts and plausibly it argues that Congress *should* be the agency to deal with them, but the conclusive answer is that the Constitution has vested in another sovereignty the power to regulate local employment relations.

The Constitution provides in Section 8 of Article I that "The Congress shall have power * * * to regulate Commerce with Foreign nations and among the several States, and with the Indian Tribes * * *"

The draftsmen of the Constitution foresaw that if economic and political intercourse between the States was to be fostered, and the welfare of the nation protected, it would be necessary to curb the selfish interests of the individual States where they might easily conflict with the interests of the federation as a whole. Therefore, jurisdiction over interstate commerce—a fertile field for controversy among individual States—was granted to the Federal Government. Its jurisdiction involves the power *to regulate, restrict and protect interstate commerce, but it does not include, and was not designed to include, the right to use such jurisdiction as a pretext to interfere with the local sovereignty of the States.* If this one premise is carefully borne in mind, the apparent confusion which sometimes arises as to the limitations on the powers of each of the concurrent

governments and which pervades the petitioners' argument is to a large extent removed.

Breadth and meaning were given to the commerce clause in *Gibbons v. Ogden,* 9 Wheat. 1 (1824). It is apparent from the language of the case, considered as a whole, that Chief Justice Marshall, although a firm believer in a strong centralized government, had no thought but that the commerce clause meant just what it says, that is, that Congress may regulate "commerce among the States." Even under the most careful scrutiny, the opinion proceeds solely on the principle that Congress has been accorded power over commerce, that is, the movement of persons and commodities among the several States, and not over farming or mining or manufacturing,—*things which may precede or follow, but are not commerce.*

The true meaning of the commerce clause, as exemplified by this decision, has sometimes been lost sight of in recent years. The argument is often made, as in the petitioner's brief, that the nation has come to a new conception of commerce, that business has outgrown the State and has become a matter of national concern, and that our purely internal political, economical and social life is so intimately connected with our national commerce that it has been swallowed up in the latter's importance. On this hypothesis, it is not difficult to argue that the wages of a newsboy, the prices of a grocer and the advertising policies of a local dentist in some degree affect incomes and business. The impact may be slight, but in the end, it may be contended, it either encourages or discourages commerce among the States.

Despite this confusion of issues, the Constitution, in the last analysis, still requires the separation of State and Federal power. The decision of this Court, in *A. L.*

A. Schechter Poultry Corporation, et al., v. United States, 295 U. S. 495 (1935), is a mandate that the literal requirements of the Constitution must not be ignored. It may be true that purely internal affairs do indirectly affect interstate commerce, just as interstate commerce bears indirectly upon internal affairs, but while this might be urged as a reason for altering our Constitutional form of government, it is not an excuse for attempting to obliterate the Constitutional distinction between commerce and that which is not.

In other recent decisions, the same principle has been affirmed and the power of Congress confined to true regulations of commerce as distinguished from regulations of internal affairs under the guise of interstate commerce legislation. Thus in the *Railway Pension Case,* [*Railroad Retirement Board v. Alton Railroad Company, et al.,* 295 U. S. 330 (1935)] it is said that

> "The question at once presents itself whether the fostering of a contented mind on the part of an employee by legislation of this type is in any just sense a regulation of interstate transportation. If that question be answered in the affirmative, obviously there is no limit to the field of so-called regulation. The catalogue of means and actions which might be imposed upon an employer in any business, tending to the satisfaction and comfort of his employees, seems endless.
>
> * * * * * * *
>
> We think the answer is plain. These matters obviously lie outside the orbit of congressional power." (p. 368)

Similarly, in *United States v. William M. Butler, et al.,* 297 U. S. 1 (1936), the Agricultural Adjustment Act fell, because it was not within the scope of the regulatory power of Congress. In refusing to be blinded by the

pretense that the legislation was justified under the taxing power of the Federal government, this Court declared:

> "The act invades the reserved rights of the States. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan. They are but means to an unconstitutional end.
>
> From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted, or reasonably to be implied from such as are conferred, are reserved to the states or to the people. To forestall any suggestion to the contrary, the Tenth Amendment was adopted. The same proposition, otherwise stated, is that powers not granted are prohibited. None to regulate agricultural production is given, and therefore legislation by Congress for that purpose is forbidden.
>
> It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted." (p. 68)

These decisions provide a sound basis for discussing the constitutionality of the National Labor Relations Act, because they enable us to perceive the real issue. The line between the divergent jurisdictions is defined by our political charter, it must be obeyed and neither the state nor the federal government may crowd the other from its allotted territory by an appeal to a broader construction than the instrument will bear. The federal government may regulate and protect the streams of commerce and the beds through which they

run, but *it may not say that all activities are commerce, or concern commerce, and thereby hope to intrude in matters which are traditionally the concern of the separate states.*

2.

THE NATIONAL LABOR RELATIONS ACT IS, ON ITS FACE, A LABOR LAW AND NOT A BONA FIDE REGULATION OF COMMERCE.

If the principle which we have stressed under the preceding heading of this brief be accepted, then some pains must be taken to ascertain the true intent and purpose of the National Labor Relations Act. We submit that the legislative history of the statute and its own literal provisions are sufficient to demonstrate conclusively that the Act, although disguised as a regulation of interstate commerce, is in actuality a regulation of labor relationships, a conclusion which the petitioner's brief unwittingly confirms.

Congress has traditionally exercised plenary jurisdiction over the instrumentalities of commerce, that is, the carriers of persons and commodities in interstate commerce. Almost every session witnesses a new development in the field of transportation regulation. Railway labor legislation has been included in the scheme of regulation, since 1888, when Congress passed the Railroad Labor Disputes Act. Since then, it has passed other railway labor legislation, culminating in the Railway Labor Act of 1926, as amended by the Act of June 21, 1934.

Despite this development in railway labor legislation, which may be properly a function of the federal government, there has been no effort by Congress to meddle in the field of ordinary labor problems, with the exception of a few brief exclusionary references in the

Clayton Act, until 1932, when Congress passed the Anti-Injunction Act (Public Resolution No. 65, 72nd Congress, approved March 23, 1932). This Act, while it contained a declaration of the right to organize and bargain collectively, did not purport to legislate generally in the field of labor relations. Its primary object was to restrict the jurisdiction of the United States courts in awarding injunctions in labor disputes and to this extent, it purported to cover labor disputes of every kind and character. Shortly afterwards, in Section 77 of the Bankruptcy Act, which was amended March 3, 1933 to provide for the reorganization of railroads, Congress took a longer step by including a prohibition against the use of reorganization funds to foster so-called plant unions and discrimination against union members. Substantially the same provisions were incorporated in Section 77B of the Bankruptcy Act, as amended June, 1934, to govern the reorganization of insolvent corporations. As bankruptcy legislation, both amendments seem questionable; they are in reality, labor regulations, having no real connection with the processes of bankruptcy, except for the disguise which Congress has employed to justify their enactment.

After the enactment of Section 77 of the Bankruptcy Act, Congress made its first determined effort to establish widespread rules of collective bargaining in Section 7 (a) of the National Recovery Act, approved June 16, 1933. Although the Recovery Act was limited in enforcement to transactions occurring in interstate commerce, the codes which it promulgated purported to cover all industry and, by administrative interpretation, the labor provisions of Section 7 (a) were forced upon the country at large. To supplement Section 7 (a) Congress enacted Public Resolution No. 44 (approved June 19, 1934), creating a National Labor Relations Board to investigate controversies arising under Section 7 (a)

and to inquire into violations. This resolution, of course, fell with the so-called National Recovery Act in the *Schechter* case.

From the foregoing summary of congressional action in the field of labor relations, it will be observed that until the year 1932, Congress made no determined effort to inject itself into domestic problems involving labor relations, except in its own peculiar domain of interstate transportation and that traditionally Congress has itself recognized the limitations of the constitution. But then, beginning with the Anti-injunction Act and continuing through the National Labor Relations Act, it has definitely committed itself to a regulation of labor on a national scale. Two of its efforts, Section 7 (a) of the National Recovery Act and Public Resolution No. 44 have proved abortive. Its latest effort in this direction is the National Labor Relations Act.

The petitioner's brief leans heavily upon the history of Federal regulation of railway labor as an argument for its extension into other fields, but the point proves too much. For one thing, it draws into sharp contrast the inactivity of Congress, until recent times, in other fields of employment relations. What is perhaps more important, it betrays the petitioner's argument as being, in truth, an attack on our Constitutional system rather than a justification of the application of the Labor Act to the present case. If the power of Congress over railroads means that it may sweep all labor relations into its grasp, there is no reason why it should not be able to subject every business activity to the same exhaustive scheme of regulation which it has imposed upon interstate carriers. Statutory limitations on wages and hours, compensation laws, safety and fire regulations, and legislative supervision of factory conditions—all would be within the scope of Federal control

and there would be an end to the sovereignty of the separate States.

A brief summary of the provisions of the National Labor Relations Act will be sufficient to show that it is an extension of this recent Congressional departure from traditional policies and that it is, at least in its attempted application to the respondent, a regulation of labor and not a regulation of Commerce.

The title of the Act, as set forth in Section 16 is "The National Labor Relations Act." Section 1, which will be considered in detail at another point, is a so-called declaration of policy, which is, in the last analysis, a somewhat extended syllogism designed by Congress to support the constitutionality of the Act. Section 2 contains a number of definitions. Among the terms defined are "employer," "employee," "labor organization," "unfair labor practice," and "labor disputes." Sections 3, 4, 5 and 6 are administrative in character, creating the National Labor Relations Board and providing for its personnel, compensation and administrative powers and duties.

The substantive provisions of the Act are set forth in Sections 7, 8 and 9. Section 7 is a declaration of the right of employees to organize and bargain collectively in language reminiscent of Section 7 (a) of the National Recovery Act. Section 8 condemns five distinct so-called unfair labor practices. These unfair labor practices consist of the following:

(1) Restraint or coercion of employees in the exercise of the rights guaranteed in Section 7.

(2) Interference with, or contribution of support to, a labor organization by an employer.

(3) Discrimination in regard to hire or tenure of employment or as to any term or condition of employ-

ment in order to encourage or discourage membership in a labor organization.

(4) Discrimination against an employee because he has filed charges or given testimony under the Act.

(5) Refusal on the part of an employer to bargain collectively with the representatives of his employees.

Section 9 approaches the question of collective bargaining from the standpoint of the employee. Sub-division 9 (a) declares that the representatives selected by a majority of the employees shall be the exclusive representatives of all employees for purposes of collective bargaining. Sub-division 9 (b) empowers the National Labor Relations Board to select the appropriate unit of employees for the purposes of the selection of representatives and sub-division 9 (c) authorizes the Board to determine who are the exclusive representatives of the employees in particular instances. Sub-division 9 (d) provides for court procedure to enforce or set aside an order of the Board.

Section 10 is procedural in character. Under Subdivision 10 (a) the Board is authorized to prevent any person from engaging in any unfair labor practice affecting commerce. Section 10 (b) provides for the procedure to be followed by the Board in its hearings, while Section 10 (c) authorizes the Board to make findings of fact and to issue orders. Sub-divisions 10 (e) and 10 (f) provide for appellate procedure to enforce or set aside the orders of the Board, authorizing it to sue to enforce its orders in any Circuit Court of Appeals (or District Court, if the Circuit Courts are in vacation) in any circuit or district where the unfair labor practice took place or where the respondent resides or does business. The aggrieved party is allowed a more limited right of appeal. Sub-sections 10 (g), 10 (h) and 10 (i) are likewise procedural in character.

Section 11, while it also enlarges the procedure to be followed by the Board in its hearings, is primarily designed to confer drastic investigatory powers on the National Labor Relations Board. There is no indication that its powers in this respect are confined to transactions in interstate commerce. On the other hand the statute provides

> "The Board or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy, any evidence of any person being investigated or proceeded against, that relates to any matter under investigation or in question. Any member of the Board shall have power to issue subpoenas requiring the attendance and testimony of witnesses, and the production of any evidence that relates to any matter under investigation or in question * * * *."

To aid this investigatory function, provisions for the enforcement of subpoenas are inserted in Sub-section 11 (2) and under Sections 11 (3) and 11 (6) evidence normally unavailable is placed in the hands of the Board.

Section 12 is penal in character, providing for a fine or imprisonment for any resistance or interference with any member of the Board or any of its agents or agencies. Section 14 provides, in effect, that the Act is designed to supersede, in case of conflict, the labor provisions of the National Recovery Act, Public Resolution No. 44 and Section 77B of the Bankruptcy Act.

It will be seen from the foregoing that the National Labor Relations Act is in reality an expression of Congressional policy on the subject of organized labor. In fifty years of railway legislation, Congress, in a series of moves, has succeeded in organizing railway labor. The first step to organize industry on a wider scale was taken

in 1932, in the Anti-Injunction Act, through the process of strengthening the strike as a weapon of organizers and unions by weakening the ability of the federal judiciary to prevent the use of violence and intimidation and the seizure of property by strikers. Then, in the amendments to the Bankruptcy Act there came a flat declaration by Congress of its support of labor unions; surely it could not be contended that this was a legitimate exercise of the power over bankruptcies. Section 7 (a) of the Recovery Act followed a similar pattern but failed of its purpose because Congress had spoken too frankly. The National Labor Relations Act has followed as a device to achieve the same end, under the guise of a regulation of commerce.

But what is there in the Act to justify it as a regulation of interstate commerce. Its obvious aim is to organize labor on a national scale. Employers are directed to bargain with national labor unions and to recognize them in given instances as the sole representatives of their employees. The operation of plant unions is seriously impeded even though they may be, in the long run, far more conducive to industrial peace and prosperity than national labor organizations. Strangely enough, while the employer is not permitted to refuse employment to union members, no matter what he may think of the union's responsibility, he may, by a contract with an organization, refuse to employ men who are not affiliated with that organization. *Are these regulations of commerce?* If Congress is so interested in the continuity of interstate commerce, why should it permit an employer to take such a position? Again, the right to strike is expressly conserved by the Act, and the utmost freedom allowed organizations and employees to violate their contracts through the use of a strike. *Does this display a Congressional regard for the movement of interstate commerce?* The very function of the Board

in this case is to sit in judgment on the employer's discretion to hire and fire as he sees fit. Does this show any concern with the plant's efficiency or its ability to maintain a steady stream of finished products? No one but the blind can be deceived by the attempt to link the statute with the interstate commerce clause. In section after section, the purpose of Congress to promote the growth of outside labor organizations throughout industry is apparent. The Board itself confirms this interpretation of the Act; no one can read the record in this case without being convinced that the determined object of the petitioner and its servants is to organize the respondent's plant, along with the whole of the nation's industry.

A similar inconsistency has crept into the petitioner's argument in this case. The possibility of a strike which might cripple the respondent's operations is urged as a complete justification for the application of the will of Congress, but no explanation is given of the express legislative sanction of the right to strike or of the petitioner's avowed policy of encouraging unionization. Yet, which is the more likely to lead to a break in the continuity of interstate movement—the discharge of ten employees, which this Act purports to treat as an offense against the majesty of the Federal government, or a strike which it sanctions?

On the face of it, it would seem inconceivable that any such legislation would be the business of the federal government.

3.

THE FACT THAT THE NATIONAL LABOR RELATIONS ACT IS BY ITS TERMS CONFINED TO TRANSACTIONS "AFFECTING COMMERCE" DOES NOT BRING IT WITHIN THE POWER OF CONGRESS TO ENACT.

The National Labor Relations Act endeavors to stay within the restraints of the commerce clause in terminology and yet, at the same time, struggles to cover a large expanse of territory. Its operations are not confined to transactions in interstate commerce, which would be the case with respect to interstate carriers, but literally reach to all matters "affecting commerce", by using this somewhat novel conception of constitutional law, which has been given currency by similar expressions in the National Recovery Act.

To appreciate the scope which Congress has attempted to give the statute and the meaning which it seeks to apply to this phrase, "affecting commerce", we must begin with the Declarations of Policy contained in Section 1 of the Act, and entitled, "Findings and Policy". It is noteworthy that almost every item of recent legislation which attempts to cover territory hitherto considered not subject to occupation by Congress, begins on a similar note. It is hard to resist the opinion that such declarations have a slight taste of intellectual dishonesty about them, as though Congress, conscious of its limitations, had sought to secure constitutional validity by proclamations that there is grave need of action on its part.

This Declaration of Policy is, in substance, a somewhat extended syllogism, neatly unraveling itself to a final conclusion that congressional action is necessary in labor controversies, to insure protection to the movements of commerce.

The first proposition is advanced that employers and employees are at unequal levels with respect to bargaining powers. To place them on equal footing, the remedy is suggested that employees be permitted to organize and exercise their bargaining power through organizations, a form of economic concentration said to be available to employers. The next step in the syllogism is that, if employers do not recognize this right to organize, and if they do not bargain with employees on a collective basis, then strikes and industrial controversies are inevitable. At the same time, Congress believes, employees are handicapped in their efforts to secure an adequate return for their labor and are seriously impeded in demanding and negotiating improvements in working conditions.

The third premise declares that these conditions, if permitted to continue, will materially impair the movement of commerce among the several States by leading to strikes, lock-outs and decreased purchasing power. Finally, from these fateful antecedents, the conclusion is drawn that it is the policy of the United States to remove obstructions to commerce by assuring to employees the right to organize and bargain collectively.

The statute then puts its argument to work by defining the term, "affecting commerce", as

> "in commerce, or burdening or obstructing commerce, or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce, or the free flow of commerce."

In our analysis of the Act itself, we have pointed out that while the Act literally applies to almost all employers and employees, its enforcement is, nevertheless, confined to transactions "affecting commerce."

The right to organize and bargain collectively is confirmed in the most general terms, and all employers are instructed, without limitation, to refrain from interference and from certain defined unfair labor practices. The only employees excepted from the Act are farmhands, domestics and members of a family. Despite this generality, the Act is administered exclusively through the National Labor Relations Board, and the administrative agency theoretically should take no action unless the controversy or question "affects" commerce.

The petitioner contends, in effect, that this limitation saves the Act from the charge of invalidity, in that it confines its application to situations where there is, from an economic standpoint, an effect or potential effect on the movement of commerce. But the use of a word or phrase, however dramatic or effective, cannot alter settled conceptions of commerce, as the Constitution has fixed them. However sensitive to local activities interstate commerce may have become, that cannot alter the provinces of the State or Federal Governments one whit, nor *change that which is not interstate commerce into that which is.*

The National Labor Relations Board, in connection with the instant case, has used the congressional syllogism in "finding" that the respondent's transactions with its employees "affect" interstate commerce. As we have pointed out, its procedure in reaching this conclusion has been utterly arbitrary and capricious. The size of the respondent's plant, where the transactions occurred, its activities elsewhere, and the activities of affiliated corporations have been probed and the conclusion reached that the respondent's business is an enterprise of some magnitude. The labor history of steel industry, generally, and of other industries, beginning

with the turn of the Century, has been examined and the conclusion reached that strikes and labor disputes are bad for business. Like Congress, the Board has found itself faced with the task of piling premise upon premise and hypothesis upon hypothesis to reach the conclusion that the discharge of a few production employees at the respondent's Aliquippa Plant has a vital bearing upon the movement of interstate commerce. We submit that this tortuous line of reasoning does not and cannot save the constitutionality of the Act. *The ultimate fact remains that Congress has enacted a labor law and not a regulation of commerce,* and it does not help to sustain the pretext that there may be an indirect connection between the two. Decisions, which will be referred to under another section of this brief, are conclusive that this Court has never been satisfied to accept such a tenuous connection as the basis of congressional regulation.

In the last analysis, the argument of the petitioner impliedly admits the remoteness of the connection between the discharge of ten employees and the movement of interstate commerce, but seeks to justify the application of the statute because of the size and importance of the respondent's operations. So far as the effect on interstate commerce is concerned, there is, in reality, no difference between the respondent's Aliquippa Plant and a neighborhood grocery store; the cause and effect may be larger, but the causal connection is just as remote. In the words of the opinion in *Carter v. Carter Coal Company,* 298 U. S. 238 (1936),

> "the distinction between the direct and indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about."

The very phrase "affecting commerce" contains within itself an admission of indirectness, that here is something which is not in or a part of commerce, but which Congress would, for reasons of expediency, like to regulate.

B.

The National Labor Relations Act Can Have No Application to the Respondent's Relations With Its Production Employees.

Because of the decisions of this Court which recognize, to a limited extent, the power of the Federal government to prevent and forestall direct impediment to interstate commerce, the petitioner's argument, as we have indicated, has chosen the course of confining the application of the statute to a relatively few situations, with the hope of escaping the almost inevitable conclusion that the Labor Act is in reality a law designed to interfere with local labor relations, rather than a legitimate regulation of commerce. Even if we should accept the hypothesis that the limitation of the Act to transactions "affecting commerce" might save it from the taint of inherent invalidity, the petitioner is still without means to justify its application to the present case.

1.

THE FACT THAT THE RESPONDENT RECEIVES AND TRANSMITS RAW MATERIALS AND PRODUCTS IN INTERSTATE COMMERCE DOES NOT SUBJECT ITS INDUSTRIAL RELATIONS AND ACTIVITIES TO CONGRESSIONAL LEGISLATION.

It is admitted that raw materials are brought from several States to the respondent's plant at Aliquippa. We are equally ready to concede that a large percentage of its manufactured products, has found its way to States other than the State of Pennsylvania. But we cannot yield to the proposition that these factors suffice to subject the production activities of the respondent to the regulation of Congress.

The Employers Liability Cases (*Howard v. Illinois Central Railroad Co.; Brooks v. Southern Pacific Company*, 207 U. S. 463 (1908), were decided at a time when Congress had undertaken a policy of comprehensive regulation of interstate carriers. Nevertheless, the decisions came as a warning in unmistakable terms that the power to supervise interstate commerce did not imply the power to speak on every related subject, however tenuous the connection might be. The Court had before it the Federal Employers Liability Act of 1906. An analysis of the statute determined that its application was in terms extended to injuries sustained by employees of interstate carriers while engaged in activities not involving the movement of interstate commerce. As a result, the Court held that although the Act embraced subjects within the authority of Congress, it also applied to matters not within its constitutional powers, and that the two applications of the statute were so intermingled that they were not capable of separation. The statute, as a whole, was, therefore, declared invalid.

Proponents of the statute in that case argued vigorously that by engaging in interstate commerce, the carriers had subjected themselves to all manner of congressional regulation. Most significant, for present purposes, was the Court's reply, for in answer to this argument, it stated:

> "To state the proposition is to refute it. It assumes because one engages in interstate commerce, he thereby endows Congress with powers not delegated to it by the Constitution; in other words, with the right to legislate concerning matters of purely state concern. * * * It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, *and would destroy the authority of the states as to all conceivable matters which, from the beginning, have been, and must continue to be, under their control so long as the Constitution endures.*" (Italics supplied) (pp. 502-503)

At the same term, provisions of the Erdman Act of 1898 were before the Court in *Adair v. United States*, 208 U. S. 161 (1908). One of the principal features of this legislation was its proscription of discrimination in the matter of employment against union members. The Court not only found that the statute was an illegal interference with the freedom of contractual relations between employer and employee, but also declared that it was not a proper vehicle of congressional action. Even although it applied to carriers and employees engaged in the interstate transportation of goods and passengers, the Court declared that the regulation itself was not a regulation of commerce, but constituted an effort on the part of Congress to affix its legislation to

a purely local thing, that is, the relation between the employer and employee. In this connection, the Court stated:

> *"But what possible legal or logical connection is there between an employee's membership in a labor organization and the carrying on of interstate commerce.* Such relation to a labor organization cannot have, in itself and in the eye of the law, any bearing upon the commerce with which the employee is connected by his labor and services." (Italics supplied) (p. 178)

See also *Railroad Retirement Board v. Alton Railroad Company, et al,* 295 U. S. 330 *supra; Hammer v. Dagenhart,* 247 U. S. 251 (1918).

2.

THE RESPONDENT'S RELATIONS AND TRANSACTIONS WITH ITS PRODUCTION EMPLOYEES ARE NOT IN OR CONNECTED WITH INTERSTATE COMMERCE.

As the statement of facts has indicated (*supra,* pages 2 to 18), the transactions which were investigated by the Board occurred in respondent's plant at Aliquippa, Pennsylvania, and involved relations between the respondent and employees formerly engaged in manufacturing operations at that plant. *This factor is the decisive point in the case.* The evidence received by the Board and its findings with respect to the respondent's other operations are entirely disconnected from the real issues of the case. In this connection, the principle which we stated at the outset of our argument bears repeating. *The power of Congress over interstate commerce is designed to allow Congress to protect commerce and to provide a uniform system of regulation of the movements of commerce, not to permit the jurisdic-*

tion of the States over local or domestic affairs to be whittled away by an extension of federal action.

The earlier decisions of the federal courts under the commerce clause do not show many instances where congressional legislation has been invalidated; until recent years, Congress made no effort to enact the far-flung legislation which has characterized its later attitude toward matters of domestic policy. As a result, most of the decisions are concerned with the power of the States to tax or regulate local subjects in situations where such taxes or regulations have at least an indirect effect on interstate commerce. Nevertheless these decisions, if analyzed, establish two parallel lines of authority, clearly demonstrating that local activities are not drawn into the current of interstate commerce merely because they are preceded and succeeded by an interstate movement.

Bacon v. Illinois, 227 U. S. 504 (1913);
Susquehanna Coal Co. v. South Amboy, 228 U. S. 665 (1913);
Packer Corporation v. Utah, 285 U. S. 105 (1932);
Nashville, etc., Ry. Co. v. Wallace, 288 U. S. 249 (1933);
Edelman v. Boeing Air Transport, Inc., 289 U. S. 249 (1933);
Minnesota v. Blasius, 290 U. S. 1 (1933);
Federal Compress, etc., Co. v. McLean, 291 U. S. 17 (1934);
Cornell v. Coyne, 192 U. S. 418 (1904);
Crescent Cotton Oil Co. v. Mississippi, 257 U. S. 129 (1921);
Heisler v. Thomas Colliery Co., 260 U. S. 245 (1922);
Oliver Iron Co. v. Lord, 262 U. S. 172 (1923);

Champlin Refining Co. v. Corporation Commission, 286 U. S. 210 (1932).

Inasmuch as these cases have reached substantially the same conclusions, based upon substantially identical arguments, it is unnecessary to subject them to close analysis. However, for the sake of emphasis, it may be desirable to single out a few unusual decisions defining the beginning of the interstate movement and its termination.

Arkadelphia Milling Co. v. St. Louis Southwestern Railways Co., 249 U. S. 134 (1918) arose out of actions by certain shippers and railway companies to enjoin the enforcement of intrastate railways rates fixed by a state railway commission. The facts indicated, in one of the cases, that the shipper was engaged in transporting logs from its lumber operation in the state to its mills, where the logs were processed and manufactured into staves and other products and held in storage, to be sold and shipped in accordance with the demands of the market. Almost 95% of the finished articles were eventually delivered to points outside of the state. The court found that the interstate movement did not begin until the sale and delivery of the finished products, declaring:

> "It is not merely that there was no continuous movement from the forest to the points without the State, but that when the rough material left the woods it was not intended that it should be transported out of the State, or elsewhere beyond the mill, until it had been subjected to a manufacturing process that materially changed its character, utility, and value." (p. 151)

Similarly in *Oliver Iron Co. v. Lord*, 262 U. S. 172 (1923), after declaring that mining "like manufacturing, is a local business," the Court added:

> "Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even though the business be conducted in close connection with interstate commerce." (p. 178)

See also *Utah Light & Power Co. v. Pfost*, 286 U. S. 165 (1932); *Chassaniol v. City of Greenwood*, 291 U. S. 584 (1934).

The reverse situation may be seen in *Industrial Association v. United States*, 268 U. S. 64 (1925), in which the Court held that a conspiracy in restraint of trade was not designed to interfere with interstate commerce, even though it had an indirect effect on the movement of articles into the state because the conspirators applied their combination to goods which had come to rest within the state. In reaffirming the dividing line between local activities and interstate movement, the court declared:

> "It is true, however, that plaster, in large measure produced in other states and shipped into California, was on the list; but the evidence is that the permit requirement was confined to such plaster as previously had been brought into the state and commingled with the common mass of local property, and in respect of which, therefore, the interstate movement and the interstate commercial status had ended." (p. 78)

These two parallel groups of decisions naturally converge into a third line of authority, establishing the principle that local activities such as mining, manufacturing, warehousing, processing and the like are not withdrawn from the jurisdiction of the states because of subsequent or precedent movements in interstate commerce. The first of these decisions is *Kidd v. Pear-*

son, 128 U. S. 1 (1888). The argument was advanced that the state had transgressed beyond its proper jurisdiction in prohibiting the manufacture of intoxicants, because the statute restricted the movement of interstate commerce. In pointing out the fundamental distinction between local activities and commerce, the court declared:

> "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different." (p. 20)

It is unnecessary to mention later decisions which have perpetuated the doctrine of *Kidd v. Pearson;* the rule of these cases offers powerful resistance to any extension of the interstate commerce jurisdiction of Congress under the guise of the "modern conception" of commerce to which we have adverted. A few of them are:

United Mine Workers v. Coronado Coal Company et al., 259 U. S. 344 (1922);
United Leather Workers v. Herkert & Meisel Trunk Co., 265 U. S. 457 (1924);
Delaware, Lackawanna & Western Railroad Co. v. Yurkonis, 238 U. S. 439 (1915);
Champlin Refining Co. v. Corporation Commission, etc., 286 U. S. 210 (1932).

Commerce has greatly expanded but there has been no real shift in emphasis from the local activities to the importation or exportation which precedes or follows them. All are essential parts of trade and business and it is both futile and absurd to speak of one as dominating the other. *The only fair conclusion that we can*

reach is that the allocation of power required by the constitution must be pursued while the constitution requires it. Where either state or federal jurisdiction attempts to use its power as a pretext to interfere with matters which are subject to the other, then the effort must be stricken down. For this reason, a state cannot use its taxing powers or its police powers to discriminate against interstate commerce, and by the same token, Congress cannot use its power over commerce to intrude into local policies.

The decisions which have been mentioned are, for the most part, concerned with state police and taxing measures, but that may be attributed to the fact that Congress has not until recently attempted to interfere in matters which do not concern it. Even so, these decisions are controlling because they in terms acknowledge the exclusive sovereignty of the states. For example, in *Kidd v. Pearson, supra,* the court rested its opinion upon the belief that, if the state law were stricken down, the jurisdiction of Congress would be greatly enlarged at the expense of the state.

This same argument was repeated in the opinion in *Heisler v. Thomas Colliery Co., et al.,* 260 U. S. 245 (1922), upholding a state taxing measure, where it is declared:

> "The reach and consequences of the contention repel its acceptance. If the possibility, or, indeed, certainty of exportation of a product or article from a State determines it to be in interstate commerce before the commencement of its movement from the State, it would seem to follow that is in such commerce from the instant of its growth or production, and in the case of coals, as they lie in the ground. The result would be curious. *It would nationalize all industries, it would nationalize and*

> *withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other States, at the very inception of their production or growth,* that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, and coal yet unmined, because they are in varying percentages destined for and surely to be exported to States other than those of their production." (Italics supplied). (p. 259)

It was this danger of the destruction of the powers of the States which seems to have evoked the following statement in the *Schechter* case:

> "But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government. *Indeed, on such a theory, even the development of the state's commercial facilities would be subject to federal control.*" (Italics supplied) (p. 546)

See also *United States v. Butler et al.*, 297 U. S. 1 (1936).

The distinction which we have emphasized between the local activities of a business and its subsequent or precedent participation in interstate commerce, has been maintained in the field of labor relations.

Hammer v. Dagenhart, 247 U. S. 251 (1918);
Howard v. Illinois Central Railway Co., 207 U. S. 463 (1908);
Industrial Accident Commission v. Davis, 259 U. S. 182 (1922).

Even assuming that participation by an employer in interstate commerce might subject certain of his activities to congressional regulation, nevertheless the relationship between the employer and his employees is purely a local matter. Although an employee may be employed in indirectly assisting the movement of interstate commerce, his relationship to his employer is not a part of commerce. It is a status existing wholly within the State, whose incidents, such as wages, hours of labor and the like are purely domestic in character. (See *Carter v. Carter Coal Company*, 298 U. S. 238). It may be true that congressional regulation of the local incidents of employment in cases involving interstate carriers has been sustained, where the Court has found the true object of Congress to be the protection of interstate commerce. But there is no precedent for interference where the real purpose of the regulation is deliberately to interfere in matters which are not the concern of the Federal Government. If the proposition should be accepted that the most insignificant participation in interstate commerce subjects all of the activities and all of the relationships of an employer to congressional measures, then there would be nothing to prevent congressional entry into the field of fire and building regulations, safety requirements, and a thousand similar measures, local in character. Yet no one would argue that regulations governing the erection and operation of factories, the hours and wages of employees, and the conditions of safe employment should be functions of the central government.

The labor provisions of the Bituminous Coal Conservation Act were almost identical with the provisions of the National Labor Relations Act. It, too, was prefaced with a legislative declaration of policy that the right of mine workers to organize and bargain collectively for wages, hours of labor and conditions of employment should be guaranteed in order to prevent constant wage cutting and disparage labor costs detrimental to fair interstate competition and in order to avoid obstructions to interstate commerce that occur in industrial disputes over labor relations at the mine. The Bituminous Coal Conservation Act likewise provided for the creation of a Labor Board to administer the labor provisions of the Code which was imposed by the statute on the producers of coal. Among the required provisions of the Code was a clause that "employes shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from interference, restraint or coercion of employers, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; and no employe and no one seeking employment shall be required, as a condition of employment, to join any company union."

Other provisions assured the right of peaceable assemblage to workers and authorized the Labor Board to determine whether or not an organization of employes was controlled or dominated by an employer and to certify the freely chosen representatives of the employes. Additional labor provisions provided for the negotiation of agreements covering hours of labor and wages by the chosen representatives of the employers and employes.

The majority opinion in *Carter v. Coal Company, et al.*, 298 U. S. 238 (1936), gave careful consideration to these provisions and found the conclusion inescapable that labor relations are not in or a part of interstate commerce and therefore cannot be subject to regulation by Congress. In this connection, it was said:

> "One who produces or manufactures a commodity, subsequently sold and shipped by him in interstate commerce, whether such sale and shipment were originally intended or not, has engaged in two distinct and separate activities. So far as he produces or manufactures a commodity, his business is purely local. So far as he sells and ships, or contracts to sell and ship, the commodity to customers in another state, he engages in interstate commerce. In respect of the former, he is subject only to regulation by the state; in respect of the latter, to regulation only by the federal government. *Utah Power & L. Co. v. Pfost*, 286 U. S. 165, 182. Production is not commerce; but a step in preparation for commerce. *Chassaniol v. Greenwood*, 291 U. S. 584, 587.
>
> We have seen that the word 'commerce' is the equivalent of the phrase 'intercourse for the purposes of trade.' Plainly, the incidents leading up to and culminating in the mining of coal do not constitute such intercourse. *The employment of men, the fixing of their wages, hours of labor and working conditions, the bargaining in respect of these things—whether carried on separately or collectively—each and all constitute intercourse for the purposes of production, not of trade.* The latter is a thing apart from the relation of employer and employee, which in all producing occupations is purely local in character. Extraction of coal from the mine is the aim and the completed result of local

activities. Commerce in the coal mined is not brought into being by force of these activities, but by negotiations, agreements, and circumstances entirely apart from production. Mining brings the subject matter of commerce into existence. Commerce disposes of it.

A consideration of the foregoing, and of many cases which might be added to those already cited, renders inescapable the conclusion that the effect of the labor provisions of the act, including those in respect of minimum wages, wage agreements, collective bargaining, and the Labor Board and its powers, primarily falls upon production and not upon commerce; and confirms the further resulting conclusion that production is a purely local activity. It follows that none of these essential antecedents of production constitutes a transaction in or forms any part of interstate commerce. *Schechter Corp. v. United States, supra,* p. 542 *et seq.* Everything which moves in interstate commerce has had a local origin. Without local production somewhere, interstate commerce, as now carried on, would practically disappear. Nevertheless, the local character of mining, of manufacturing and of crop growing is a fact, and remains a fact, whatever may be done with the products." (Italics supplied) (pp. 303-304)

It could be said in support of the Coal Conservation Act it did seek to regulate other things as well as labor relations and that its labor provisions were merely designed to aid its price-fixing requirements, which, standing alone, might have been valid. The National Labor Relations Act has not even this virtue; it is purely a statutory plan for regulating labor relations. *In the light of the Carter case, can there be any doubt of its invalidity?*

The case of *Texas and New Orleans Railroad Co. v. Brotherhood of Railway and Steamship Clerks, et al.*, 281 U. S. 548 (1930), furnishes no precedent for the National Labor Relations Act. This case arose under the Railroad Labor Act of 1926, which set up machinery for the voluntary adjustment and arbitration of labor disputes before boards of adjustment and boards of arbitration. The plaintiff union had a controversy with the Railroad before a board of adjustment; pending the decision, the defendant railroad created a rival union, by indulging in alleged coercive and oppressive tactics. The union brought injunction proceedings under the section of the Act which declared that "representatives, for the purposes this Act, shall be designated by the respective parties * * * without interference, influence or coercion * * *." The District Court expressly held that the statute was constitutional and granted an injunction. The Circuit Court of Appeals affirmed the District Court, stating:

> "We think that under the power to regulate interstate commerce it is competent for Congress to make provision for the settlement of disputes between interstate carriers and their employees with reference to rates of wages, rules, and working conditions, to the end of preventing such disputes resulting in the interruption or stopping of the movement in interstate commerce of freight or passengers." (33 F. (2d) 13, 16).

This Court accepted the argument of the Circuit Court and sustained the Act as a regulation of commerce with the statement, "Congress may facilitate the amicable settlement of disputes which threaten the service of *the necessary agents of interstate transportation.*"

We submit that the distinction between the present case and that involved in the Texas & New Orleans Rail-

road Company case is implicit in the opinion of this Court. The transportation of persons and commodities between states is, of course, the very essence of interstate commerce. As a consequence, congressional regulation of rates, transportation facilities, equipment, personnel and related matters has been uniformly sustained. It would be indeed difficult to find a more comprehensive and thorough program of legislation than that developed in the Halls of Congress to govern the operations of carriers and communication systems. The breadth of this legislation is attributable to another cause as well. Railroads are classed as public service corporations which, by virtue of their public obligations, are required to continue operations if the government so directs. This power to compel continuity of operations necessarily implies a wide latitude to enact all manner of legislation to prevent interruptions and to increase the probabilities of continuous service. The Railway Labor Act of 1926 was merely a part of a general program. It was not a comprehensive labor statute, but a device to promote the amicable adjustment of disputes threatening the continuity of carrier operations. Accordingly, the admitted power of Congress to compel the carriers to operate would necessarily imply the right to enact such legislation.

And even this power has its limitations. The majority opinion in *Railroad Retirement Board v. The Alton Railroad Co., et al.*, 295 U. S. 330, *supra*, is an indication that Congress cannot, under the pretext of regulating commerce, enact legislation designed to foster "a contented mind on the part of an employee," and that the decision in the *Texas & New Orleans Railroad Company* case is not a controlling precedent here. It was said:

> "The Railway Labor Act was upheld by this court upon the express ground that to facilitate the

amicable settlement of disputes which threatened the service of the necessary agencies of interstate transportation tended to prevent interruptions of service and was therefore within the delegated power of regulation." (p. 369)

8.

DECISIONS INVOLVING CONGRESSIONAL REGULATION OF THE SO-CALLED "STREAM OF COMMERCE" ARE INAPPLICABLE IN THE PRESENT CASE.

The decision, of the National Labor Relations Board endeavored to find that the respondent's Aliquippa Plant is merely a way station in the transit of commerce, with the thought of justifying the application of the Act to local transactions, because they are merely eddies in the stream of commerce. The facts which we have stated have indicated that the respondent's operations are not merely trifling interruptions of the movement of commerce. Its plant at Aliquippa is extensive in size and represents a very substantial investment in buildings, machinery and equipment. The raw materials which come to the respondent from the State of Pennsylvania and elsewhere are delayed for a long period of time and, after being subjected to the manufacturing processes of the respondent, are changed substantially as to character, utility and value. The finished products which emerge are to a large extent manufactured without reference to pre-existing orders and contracts and are entirely different from the raw materials which enter at the other end. If importation and exportation in interstate commerce do not singly transfer purely local activities into the field of Congressional regulation, it should follow that their combination would not alter the local situation.

The origin of the conception of a stream of commerce may be traced to the case of *Swift & Co. v. United States*, 196 U. S. 375 (1905), which involved an action by the United States under the Sherman Act to restrain a conspiracy in restraint of trade. It appeared that a conspiracy existed among six large meat packing houses and was accomplished through a combination among dealers and commission men in the stockyards to refrain from bidding against each other. The defendants argued strenuously that all of their activities took place within the confines of a single state. The Court nevertheless took a broader view of the facts and concluded that the object of the conspiracy was to monopolize and impede the movement of interstate commerce from the stock farms in the West to the ultimate consumer in various states. There was no need to refer to any other factor than that defendants had deliberately designed to obstruct the movement of commerce, but the Court nevertheless made the statement that:

> "When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce." (pp. 398-399)

Subsequently in two decisions, *Stafford v. Wallace*, 258 U. S. 495 (1922), and *Chicago Board of Trade v. Olsen*, 262 U. S. 1 (1923), the same conception was applied to sustain Congressional regulation of certain local activities. The *Stafford* case involved the Stockyards and Packers Act. Congress, after a series of elaborate investigations, had found that the large packing houses

had taken advantage of their control over the stockyards and connected facilities to control the prices of cattle. The stockyards were, of course, centers located in the larger cities where cattle in transit from western states were temporarily detained, watered and fed and sometimes slaughtered. Most of the sales from producers to dealers and packers took place while the cattle were in the yards, being handled through commission agents. The statute enacted by Congress provided comprehensive regulation of the yards, connected facilities, the fees and activities of commission men and dealers and similar subjects. Although the act applied in terms to local activities, the Court found that these activities were so closely connected with the general current of commerce that they were subject to Congressional regulation.

The *Olsen* case involved the Grain Futures Act, which provided for direct regulation of the practices of grain exchanges and their members, the primary object being to control dealings in grain futures. Similar Congressional regulation in the Future Trading Act, through the device of a prohibitory tax, had been invalidated in *Hill v. Wallace*, 259 U. S. 44 (1922). The second plan of Congress to regulate future trading followed after a series of investigations into abuses in future trading had led to the conclusion that such trading, unless subjected to regulation, could have disastrous effects upon commerce in grains. In the *Olsen* case, the Grain Futures Act was sustained, although the activities of grain exchanges and their members were purely local in character, because these activities, unless regulated, constituted a very serious threat to the current of interstate commerce in grains and because the exchanges were in the nature of public utilities. Cf. *Tagg Bros. & Moorehead v. United States*, 280 U. S. 420 (1930); *Tyson & Bro. v. Banton*, 273 U. S. 418 (1927).

Advocates of the legality of the National Labor Relations Act attribute more force to this conception of a stream of commerce than the decisions establishing it warrant. It was useful in conspiracy cases because it obviates the necessity of proving a direct restraint upon an actual train of interstate commerce. In the *Olsen* and *Stafford* cases, it served a somewhat different purpose. Both cases dealt with peculiar situations; they involved focal points, through which the stream of commerce swept on its way from producer to the ultimate consumer. A stockyard is an institution which assembles live stock from various portions of the country, arranges for its temporary storage and then sends it on its way, after the shift of ownership has been made from the producer to the packer or dealer. The grain exchange which was involved in the *Olsen* case, performs a similar function for grains. Grains are, for the most part, warehoused in transit, where the grain exchange is located, and the exchange serves as a market place for shifting title and arranging the final destination of the produce. In other words, both stockyards and exchanges are instrumentalities of commerce, in much the same way as the actual carriers of commodities. This factor was emphasized in both the *Olsen* case and the *Stafford* case. Thus, in the *Stafford* case, we find the statement:

> "The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East, and from one state to another. Such transactions cannot be separated from the movement to which they contribute and necessarily take on its character." (p. 516)

Similar language appears in the *Olsen* case, in the declaration that:

> "The sales on the Chicago Board of Trade are

> just as indispensable to the continuity of the flow of wheat from the West to the mills and distributing points of the East and Europe, as are the Chicago sales of cattle to the flow of stock toward the feeding places and slaughter and packing houses of the East." (p. 36)

It would be impossible to extend the language of the decisions beyond their immediate facts, without entirely obliterating the distinction between that which is interstate commerce and that which is not. From a speculative viewpoint, almost every business participates, to a limited extent, at least, in the general current of commerce. This participation is merely magnified in those idustries which import and export materials before and after their manufacturing or other operations. But such industries are not instrumentalities of commerce in the same sense as stockyards or grain exchanges and to hold that they are would be to overemphasize the current of commerce at the expense of local authority. It is, therefore, reasonable to believe, from a careful consideration of both the *Olsen* and *Stafford* decisions and from a realization of the lengths to which the conception would otherwise be driven, that the doctrine is to be confined to instrumentalities of the broad movement of interstate commerce and not to be tortured into application to local activities which have merely a remote bearing on interstate trade. Consequently, we find that the decision in *Arkadelphia Milling Co. v. St. Louis Southwestern Railways Co.*, 249 U. S. 134 (1919), which came long after the Swift case, expressly declared that the conception of a "stream of commerce" did not change the character of local manufacturing operations.

There is another distinguishing factor involved in the cases which we have just seen. Not only are the

stockyards and grain exchanges, in practical effect, instrumentalities of interstate commerce, but in both instances, Congress had enacted comprehensive regulations to prevent the continuance of constantly recurring practices which had and were designed to have direct and immediate effects on interstate commerce. The distinction which we have emphasized throughout comes to the fore again, to set these exceptional decisions apart in their true light. The Court perceived the intimate connection between the local activities involved and the broad movement of interstate commerce and it recognized that the primary object of Congress was to protect the interstate movement of grains and cattle against direct restraints and interferences. But that is no precedent for arguing that this Court should sustain Congressional regulation of remote local activities where the true object of the statute is to regulate such activities and not to assist the movement of commerce.

Thus in the majority opinion in *Carter v. Carter Coal Company* 298 U. S. 238, it was said:

> "It was nowhere suggested in these cases that the interstate commerce power extended to the growth or production of the things which, after production, entered the flow. If the court had held that the raising of the cattle, which were involved in the Swift case, including the wages paid to and working conditions of the herders and others employed in the business, could be regulated by Congress, that decision and decisions holding similarly would be in point; for it is that situation, and not the one with which the court actually dealt, which here concerns us." (pp. 305-306)

The constantly recurring evils to which the petitioner refers in its endeavors to draw the present issues into the purview of the Stafford and Olsen cases are not

clearly defined in the petitioner's brief. If it is speaking of strikes and lockouts, which actually result in a stoppage of shipments or of raw materials, then its argument relates to conditions which are not existent in the present case. If it is speaking of the respondent's relations with the complaining employees, then its argument is equally unconvincing because these are matters traditionally too remote from the stream of commerce to admit of federal intervention, unlike the activities in the Grain Exchange and Stock Yard cases, which were in the very current of commerce, and a part of the instrumentality of commerce which Congress had sought to regulate. The difference between the two situations is as great as the difference between the regulation of safety appliances on interstate carriers, which is obviously a fit subject for Congressional action and the regulation of safety conditions in manufacturing plants, which is not.

4.

THE CONNECTION BETWEEN THE RESPONDENT'S RELATIONS WITH ITS EMPLOYEES AND THE MOVEMENT OF INTERSTATE COMMERCE IS INDIRECT AND REMOTE AND DOES NOT JUSTIFY THE APPLICATION OF THE NATIONAL LABOR RELATIONS ACT TO THE ISSUES OF THE PRESENT CASE.

An examination of the decisions which sustain Congressional regulation of local activities where they have exerted a direct inhibitory effect on the movement of interstate commerce will find them grouped in two principal categories: (1) cases involving conspiracies to restrain commerce under the Anti Trust Laws, and (2) cases involving the regulation of stockyards and grain exchanges (which have been briefly discussed under the preceding section of this brief). Although the one group

of cases involves the power to punish restraints after they have occurred, and the other the power to forestall them, both rest upon the same foundation, that is, the intimate, direct connection between the subject of Congressional action and the movement of commerce, a connection which no amount of rhetoric can supply in the present case.

The petitioner counts heavily upon the decisions of this Court which have upheld the application of the Anti Trust Laws to industrial conspiracies, such as strikes and lockouts, notably *Coronado Coal Company v. United Mine Workers*, 268 U. S. 295 (1925); *Bedford Cut Stone Co. v. Stonecutter's Association*, 274 U. S. 37 (1927); *Duplex Printing Co. v. Deering*, 254 U. S. 443 (1921-; and *Loewe v. Lawlor*, 208 U. S. 274 (1908). From these decisions the petitioner induces a double-edged principle, viz., that Congress may deal with labor disputes, either punitively or prospectively, (1) where there is a direct intention to restrain interstate commerce and (2) where such restraint is the necessary and direct result of the activity which is being subjected to control. The petitioner's argument is, in substance, that the issues of the present case fit the formulae of these decisions in both respects because there is (1) an implied intent to restrain interstate commerce and (2) a direct and necessary burden upon interstate commerce.

The industrial conspiracy cases, the petitioner argues, could not have depended upon the existence of an actual intent to restrain interstate commerce, because the state of mind of the participants could not add to nor subtract from the power of Congress. Yet strangely enough, the element of intention *was* a most important factor in these cases because they involved nothing more nor less than the application of a penal statute which required an actual plan to restrain inter-

state commerce in order to have a punishable offense. This is very clear from the *Coronado* case, for, on the occasion of its first appearance in this Court, (*United Mine Workers v. Coronado Coal Co., et al.*, 259 U. S. 344 (1922)) the record showed merely a persistent and unlawful interference with the production of the plaintiff's coal mines by members of the defendant unions. Since the record was barren of any evidence of an intention to restrain the movement of commerce, the Court said that interference with production, regardless of its ultimate effect on interstate commerce, would not alone suffice to constitute a violation of the Sherman Act. As a result, the case was remanded with the statement that

> "Coal mining is not interstate commerce, and the power of Congress does not extend to its regulation as such. In *Hammer v. Dagenhart*, 247 U. S. 251, 272, we said: 'The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce, make their production a part thereof. *Delaware, Lackawanna & Western R. R. Co. v. Yurkonis*, 238 U. S. 439.' Obstruction to coal mining is not a direct obstruction to interstate commerce in coal, although it, of course, may affect it by reducing the amount of coal to be carried in that commerce." (pp. 407-408)

At the second trial, there was both direct and inferential evidence of a plan to check the movement of coal into other states. The direct evidence indicated that the striking unions had planned to prevent the coal from competing with the product of union mines in other states, while the inferential proof consisted of evidence that the strikers' activities had in fact seriously restrained the interstate movement of coal [See *Coronado Coal Company v. United Mine Workers*, 268 U. S. 295,

308, 310, (1925)]. On the basis of the new evidence, this Court found that the transactions were within the prohibition of the Sherman Act as a conspiracy with intent to restrain interstate commerce. The petitioner is clearly in error in arguing that the *Coronado* cases stand for the proposition that the likelihood of impeding the movement of commerce will of itself satisfy the statutory requirement of intent. Of course, the intent of the conspirators to restrain commerce may be inferred from its actual stoppage on the theory that the conspirators must have intended the reasonable consequences of their acts, but this does not mean that there is no distinction between a deliberate interference with commerce (which is obviously direct) and an act which *might* lead to a disturbance of the stream, (which is, of its very nature, indirect).

A comparison of the second *Coronado* case, *supra*, with the decision in *United Leather Workers v. Herkert and Meisel Trunk Co.*, 265 U. S. 457 (1924) points this distinction in striking fashion. In the latter case, it was shown that the strike seriously impaired the complainant's operations and thereby diminished its purchases of raw materials from other states, as well as its shipment of finished articles across state lines. However, since there was no evidence that the conspirators had directly interfered with or intended to interfere with interstate movements in either raw materials or finished products, it was held that the effect on interstate commerce was too remote to warrant punishment under the Sherman Act. See also *Industrial Association v. United States*, 268 U. S. 64 (1925).

The efforts of the petitioner to fit the present case into the pattern of the conspiracy cases, by fabricating an intent to restrain interstate traffic, are unconvincing. Conceivably, if there were a strike at the respondent's

plants or a strike in the Steel Industry generally, the strikers might plan or intend to check the movements of materials to and from the respondent's plant or in the industry as a whole. But clearly, the respondent could not be held responsible for the *voluntary* intervening acts of outside agencies. The possibility of an *intentional* restraint by strangers would, if anything, weaken the connection between the transactions in issue and the movement of commerce rather than strengthen it. The suggestion that the respondent might be charged with an implied intent to destroy or diminish the movement of interstate trade, if a labor dispute should occur, which might lead to a strike, is almost ludicrous. The respondent's sales offices in twenty cities, of which the petitioner makes so much capital in its brief, should provide the answer to this supposition.

In reality, the conspiracy decisions, instead of aiding the petitioner, have thrown it out of court. Although cases such as *United Mine Workers v. Coronado Coal Company, et al.*, 259 U. S. 344 (1932) and *Local 167, etc., v. United States*, 291 U. S. 293 (1934) are primarily concerned with the application of the Anti Trust Laws to particular situations, rather than with their constitutional scope, they do provide a definite line of demarcation between direct and indirect effects which is fatal to the petitioner's contentions. It is not true, as the petitioner's brief assumes, that if Congress can punish a concerted plan to interrupt or restrain interstate trade, it must therefore have unlimited means to anticipate every situation which *might* develop into a punishable restraint. Would petitioner contend that because the Federal government may move against striking unions for restraining commerce in violation of the Sherman Act, Congress would therefore have the power

to prevent a laborer from joining an organization on the theory that he might some day participate in an illicit conspiracy?

There is a definite limitation which inheres in the very language of the commerce clause, and that is, that the "preventive" legislation, as the petitioner terms it, *must be confined to the legitimate regulation of commerce.* Congress can prevent, just as it can punish, direct restraint, but it cannot move in on purely local activities because they might conceivably affect the current of interstate trade.

The definition which the National Labor Relations Act gives of the term "affecting commerce" demonstrates the inapplicability of the Anti-Trust decisions to the present cases. The statutory definition does not stop with labor practices which "obstruct commerce"; it goes on to those which "have led or tend to lead" to labor disputes which burden commerce. [Compare the similar use of the phrase "affecting commerce" in *A. L. A. Schechter Corp. v. United States,* 295 U. S. 495 (1935)]. It is this tenuous connection which the petitioner relies upon in the present case and which the conspiracy decisions declare, by implication, to be beyond the legislative reach of Congress.

There is no better way of illustrating this deficiency in the petitioner's argument than by a comparison of *Local 167, etc., v. United States,* 291 U. S. 293 (1934), a conspiracy case, with the decision of this Court in the *Schechter* case. The former involved an exercise of the control power (to adopt petitioner's terminology) in that it concerned a conspiracy among the poultry market men, drivers and shochtim in the New York area to injure the business of dealers in poultry in the locality.

Although the conspiracy was effectuated by means of purely local activities, it was considered subject to punishment as a restraint upon interstate trade, because it directly impeded the importation of poultry into New York. In the *Schechter* case, the preventive power of Congress was involved but the factual situation was almost identical. The Government endeavored to support the application of a federal Code of Fair Competition to wages, hours of labor and trade practices among the poultry dealers in New York City, on the theory that the regulation was necessary to lift restraints on the movement of commerce into the area. The fantastic succession of possibilities which the Government desired to use in the *Schechter* case as a substitute for the direct, immediate connection of the conspiracy cases was not acceptable, and this Court pointed out the distinction with the statement:

> "This is not a prosecution for a conspiracy to restrain or monopolize interstate commerce in violation of the Anti-Trust Act. Defendants have been convicted, not upon direct charges of injury to interstate commerce or of interference with persons engaged in that commerce, but of violations of certain provisions of the Live Poultry Code and of conspiracy to commit these violations. Interstate commerce is brought in only upon the charge that violations of these provisions—as to hours and wages of employees and local sales—'affected' interstate commerce." • • •
>
> "Where a combination or conspiracy is formed, with the intent to restrain interstate commerce or to monopolize any part of it, the violation of the statute is clear. *Coronado Coal Co. v. United Mine Workers,* 268 U. S. 295, 310. But, where that intent is absent, and the objectives are limited to intrastate activities, *the fact that there may be an indirect*

effect upon interstate commerce does not subject the parties to the federal statute, notwithstanding its broad provisions. This principle has frequently been applied in litigation growing out of labor disputes."

* * * * * * *

"While these decisions related to the application of the federal statute, and not to its constitutional validity, *the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system.* Otherwise, as we have said, there would be virtually no limit to the federal power, and for all practical purposes we should have a completely centralized government." (Italics supplied) (pp. 545-548)

Similarly, in *Industrial Association v. United States,* 268 U. S. 64 (1925), the Court was careful to point out the distinction between a deliberate, direct interference with interstate commerce and a remote, fortuitous reaction resulting from purely local difficulties, in the statement that

"The alleged conspiracy and the acts here complained of, spent their intended and direct force upon a local situation—for building is as essentially local as mining, manufacturing or growing crops—and if, by a resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act. (Comp. St. 8820 *et seq.*)" (p. 82)

Stafford v. Wallace, 258 U. S. 495 (1922) and *Chicago Board of Trade v. Olsen*, 262 U. S. 1 (1923) are equally unavailable to the petitioner on this point, for they too serve to emphasize the distinction between indirect and direct effects, as we have indicated under the preceding section. (See pages 78 to 83, *supra*.)

We have mentioned the implied admission of indirectness in the statutory definition of "affecting commerce", in that it applies not only to practices *burdening* commerce, but also to those which *might* tend to lead to labor disputes which *might* burden the movement of interstate trade. The same indirectness is woven into the fabric of the petitioner's argument, as it was in the *Schechter* case (the term used there was "affecting commerce"), but it is artfully concealed in almost every paragraph of its brief. Again and again the petitioner harkens to the fact that strikes frequently have an adverse effect on the movement of commerce to and from the affected establishment and this hypothetical connection is pleaded as a sufficient justification for the application of the statute to the facts of this case. If this were a proceeding against striking employees under the Anti-Trust Laws, the connection between strikes and stoppages of commerce might be legitimately urged as a reason for inferring an intent to restrain the movement of commerce. But here there is no actual or threatened strike such as the petitioner supposes to exist. Despite the petitioner's efforts to magnify the facts of this case into a national crisis, the controversy remains a simple issue between an employer and ten employees over the propriety of disciplinary acts of the respondent's agents. The fact that the dis-

charges *might* have led to dissatisfaction, which *might* have led to a dispute of more serious consequences, which *might* have resulted in a walk-out, which *might* have led to an interruption or switch in the movement of interstate commerce, does not satisfy the constitutional requirement of a direct and immediate connection. Not only are there several steps in the relation between the issues of this case and the movement of commerce, but each step is built upon the quicksand of a doubtful possibility. Similarly, the sections of the National Labor Relations Act, under which the petitioner proceeded in this particular case, are not concerned with strikes or with boycotts, but with the relationship between this employer and the complaining employees. They look merely to the enforced return of the complainants to the respondent's payroll, with back pay, and not to the relief of the stricken channels of commerce.

The petitioner is evidently disturbed by the tenuous character of the succession of possibilities upon which it has relied to support its findings of fact, because it argues that the connection between the discharge of employees and the stoppage of interstate commerce has been established for it by the declaration of Congress. We submit that the involved trail of reasoning which Congress itself has followed in order to link labor disputes with the movement of trade, as it appears in the Declaration of Policy which prefaces the Act, is a convincing demonstration of the remoteness of the connection. The extended syllogism indicates that Congress has indeed recognized its remoteness and has hoped to draw it closer by an elaborate outline of its premises. A similar declaration of policy was made in

the Grain Futures Act, which was upheld in *Chicago Board of Trade v. Olsen*, 262 U. S. 1 (1923), but the connection there was much closer. Congress had undertaken elaborate investigations and had found that the movement of grain was so sensitive to dealings in grain futures that it was a comparatively simple matter, through such dealings, to control supply and demand and therefore prices. There was only one step in that argument. Future trading had been used to produce shortages and abundances of grain, the object being to profit by manipulated prices. Because of the long study which Congress had devoted to the problem, its finding of an intimate connection was accepted. But even there, as a careful study of the opinion will reveal, this Court reviewed in great detail the evidence which was placed before Congress and concurred in the findings that Congress had made. The decision is not an authority for the proposition that a declaration by Congress of the need of regulation will automatically justify its action.

This is well illustrated by *Carter v. Carter Coal Company, supra.* The issues in that case were almost identical with those of the present case. The Bituminous Coal Conservation Act, like the Labor Act, was prefaced with a declaration of congressional policy that the labor provisions of the Act were essential to prevent labor disputes at the mines and therefore to forestall interruptions of the movement of Interstate commerce. As if in confirmation of the congressional finding, the Trial Court in that case, like the Labor Board in this case, found that the production of coal was vital to the public welfare and to the industries and economic life of the Nation; that its distribution in interstate commerce should be regular, continuous and free of interruptions; that the predominant portion of the coal produced was shipped in interstate commerce and that the existence of a condition of unrestrained

and disturbed competition had burdened and restrained interstate commerce. These findings of Congress and of the lower Court *were legally insufficient to justify the labor provisions of the Act.* The majority opinion declared:

> "That the production of every commodity intended for interstate sale and transportation has some effect upon interstate commerce may be, if it has not already been, freely granted; and we are brought to the final and decisive inquiry, whether here that effect is direct, as the 'preamble' recites, or indirect. The distinction is not formal, but substantial in the highest degree, as we pointed out in the *Schechter* case, *supra*, p. 546, *et seq.* * * *
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> * * * *The distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about.* If the production by one man of a single ton of coal intended for interstate sale and shipment, and actually so sold and shipped, affects interstate commerce indirectly, the effect does not become direct by multiplying the tonnage, or increasing the number of men employed, or adding to the expense or complexities of the business, or by all combined.
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> * * * * * *
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> *Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment and irregularity of production and effect on prices; and it is insisted that interstate commerce is greatly affected thereby. But, in addition to what has just been said, the conclusive answer is that evils are all local evils over which the federal government has no legislative*

control. The relations of employer and employee is a local relation. At common law, it is one of the domestic relations. The wages are paid for the doing of local work. Working conditions are obviously local conditions. The employees are not engaged in or about commerce, but exclusively in producing a commodity. And the controversies and evils, which it is the object of the act to regulate and minimize, are local controversies and evils, affecting local work undertaken to accomplish that local result. *Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect.* An increase in the greatness of the effect adds to its importance. It does not alter its character. * * *" (Italics supplied) (pp. 307, 308)

The petitioner has sought to escape the implications of the decision by the argument that here the respondent's operations are *both* preceded *and* succeeded by a movement in commerce. Such a distinction is transparently technical. The substance of the *Carter* case is that labor relations are intrinsically local in character; their bearing on the movement of commerce is *essentially and legally* indirect. This is borne out by the decision in *Arkadelphia Milling Co. v. St. Louis S. W. Ry. Co.*, 249 U. S. 134, *supra*, where it was declared that the conception of a "stream of commerce" did not change the character of local manufacturing operations, even where they were in mid-stream.

The petitioner's argument seeks to convince this Court that *Carter v Carter Coal Company, supra*, is inapposite because it was primarily concerned with the wage- and hour-fixing provisions of the Bituminous Coal Conservation Act. Our analysis of the labor provisions of that statute has indicated that they were in many

respects identical with the provisions of the National Labor Relations Act. Prohibitions against support of a labor organization by an employer and against requiring an employee to join a so-called company union are common to both Acts. Although the terminology is different, both statutes confirmed the right of collective bargaining and authorized an administrative agency to select or certify the exclusive representatives of the employees. As a matter of fact, the Coal Act did not purport to fix either wages or hours of labor except *through the medium of collective bargaining,* for it provided that wages and hours should be determined by collective agreements between the representatives of the producers and the representatives of a majority of the workers. Although this feature of the Coal Act was condemned as an arbitrary delegation of power, the principal reason for invalidating the statute was that *labor relations and matters of collective bargaining are within the jurisdiction of the States and not of Congress.* This is clear from the language which we have quoted from the majority opinion in the *Carter* case. The argument was made in support of the Coal Act that it was designed to eliminate *"the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment and irregularity of production and effect on prices* * * *."* The conclusive answer was that these evils were "local evils, over which the Federal Government has no legislative control. *The relation of employer and employees is a local relation."*

This Court has said, again and again, that if the bars be let down to labor legislation under the guise of a regulation of commerce, there is an end to the sovereignty of the states as defined by the constitution.

THE CENTRAL GOVERNMENT IS ONE OF SPECIFIED POWERS, WHICH CAN BE ENLARGED ONLY BY THE WILL OF THE PEOPLE AND NOT BY THE USURPATION OF CONGRESS OR THE SELF-SERVING FINDINGS OF AN ADMINISTRATIVE AGENCY.

Of course a finding of Congress is entitled to some weight but it is difficult to believe that the Court will accept it as controlling, if it runs counter to the many decisions that local activities are not commerce, although succeeded or preceded by a movement in commerce, and that industrial relations have no such connection with interstate commerce as would bestow upon Congress the power to govern them. (Cf. *St. Joseph Stockyards v. United States*, 298 U. S. 38 (1936), *supra*).

The same distorted path of argument was employed by Congress to justify the Agricultural Adjustment Act. This Court was urged to find that the decrease in farm prices, incident to the depression, had seriously affected the national income and therefore the general welfare. In other words, it was contended that farming had become a national problem, just as it is contended in the instant case, that the respondent's relations with its employees have been converted into a matter of national concern because of the size of the respondent's operations and the magnitude of the steel industry in general. The tremendous mass of data and opinion received in evidence by the Board to show the past history of the steel industry, and its industrial relations had this object in view; to convince this Court that the need of organization in the steel industry is a matter of national importance. The majority opinion in *United States v. Butler, et al.*, 297 U. S. 1 (1936), makes short shrift of this argument in the simple statement that:

> *"It does not help to declare that local conditions throughout the nation have created a situation of national concern;* for this is but to say that when-

ever there is a widespread similarity of local conditions, Congress may ignore constitutional limitations upon its own powers and usurp those reserved to the states." (pp. 74-75)

We believe we may justifiably conclude that the Court will recognize that Congress cannot use the conception that transactions "affecting commerce" are subject to its authority as a pretext to interfere in matters which are not a part of interstate commerce; that it will confine the doctrine of the grain exchange and stockyards cases to transactions which are intimately connected with the movement of commerce, or directly obstruct and impede it; and that it will not justify, as a regulation of commerce, a statute *which piles speculation upon speculation to attain its ends.* There is no better way to demonstrate our conclusions than by a reference to the opinion of Chief Justice Hughes in the *Schechter* case:

> "The argument of the government proves too much. If the federal government may determine the wages and hours of employees in the internal commerce of a state, because of their relation to cost and prices and their indirect effect upon interstate commerce, it would seem that a similar control might be exerted over other elements of cost, also affecting prices, such as the number of employees, rents, advertising, methods of doing business, etc. All the processes of production and distribution that enter into cost could likewise be controlled. If the cost of doing an intrastate business is in itself the permitted object of federal control, the extent of the regulation of cost would be a question of discretion and not of power." (p. 549)

POINT III.

The Procedural Provisions of the National Labor Relations Act Are Invalid, in That They Violate Section 2 of Article III of the Constitution and the Seventh Amendment to the Constitution.

Although it may be asserted that the petitioner is merely a fact-finding administrative agency, an examination of its functions will indicate that in the present case, at least, it has assumed judicial powers and purported to exercise jurisdiction over a controversy which is normally subject to the powers of the constitional courts.

Under Section 10 (b) of the Act, the petitioner is empowered to hear and determine charges that an employer has engaged in unfair labor practices, including complaints filed by employees based upon charges of discrimination. Under Section 10 (a) the power of the Board to prevent unfair labor practices is made *exclusive* and under Section 10 (c), in controversies between employee and employer over discriminatory discharges and demotions, the petitioner is authorized, after hearing, to render affirmative relief, by requiring the employer to reinstate the complaining employee, with or without compensation for loss of wages. In this respect, the petitioner is given exclusive jurisdiction over private quarrels between employees and their employer and it has, in fact, assumed such jurisdiction in the instant case.

The procedure ordained by the Act, in controversies like the present, requires that a hearing shall be held and evidence received, following which the petitioner is given authority to make findings of fact and to issue affirmative as well as negative orders. The provisions for review appear in Sections 10 (e) and 10 (f), the

former permitting the Board to apply to the Circuit Courts of Appeal for the enforcement of its orders (and, in exceptional cases, to the District Courts), and the latter providing for similar review by the Circuit Courts of Appeal at the instance of parties aggrieved by the Board's orders. In either case, the jurisdiction of the Court in which the petition is filed is made exclusive and the decision of the reviewing Court is made on the basis of *the record before the Board,* the findings of the Board on the facts being made conclusive, if supported by evidence. Only those objections which have been urged before the Board are available in the reviewing court. From this summary, it is apparent that the Board is vested with *exclusive original* jurisdiction of complaints against an employer, the appeal to the reviewing court being in all respects similar to an appeal from a constitutional court and subject to the same limitations as to the scope of the review.

The procedure which the statute prescribes was followed with particularity in the present case. Written charges were made by the thirteen complaining employees, in which it was alleged that they had been wrongfully discharged or demoted by the respondent. The petitioner assumed jurisdiction of the controversy and issued a complaint, calling upon the respondent to file a written answer, meeting the allegations of the Board's pleading. An answer was filed and the Board proceeded to hear and determine the facts with respect to the controversy between the complaining employees and the respondent. Its decision found that ten of the complainants had been wrongfully discharged and directed the respondent to reemploy them, with full compensation for lost pay. The petitioner then applied to the Circuit Court of Appeals for an order enforcing its decision and the Circuit Court heard and dismissed the Board's petition upon the basis of the written transcript

of the record which had been certified to the Circuit Court.

The Seventh Amendment to the Constitution assures the right to trial by jury "in suits at common law, where the value in controversy shall exceed $20.00. * * *" Although it may be suggested that the Labor Act transcends the common law in requiring the restoration of employees discharged for union activities, an action for wages after wrongful discharge is clearly the function of common law courts. In this case, the petitioner has usurped this function by directing the payment of wages to the complaining employees, thereby entering against the respondent an order which is, in all respects, the equivalent of a money judgment. It may be urged that this is permissible under the decision in *Texas & New Orleans Railroad Company v. Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548 (1930), which is discussed in detail in another point in this brief, but it is to be observed that that decision did not involve statutory procedure, as in the present case, but was concerned solely with the power of a court to protect its injunctive processes by requiring the defendant to purge itself of contempt of the decree through the restoration of the *status quo*.

The petitioner has endeavored to evade the requirements of the Seventh Amendment by comparing the present controversy to a suit in equity. In its brief in the Associated Press case (No. 365), it is argued that the restoration of lost pay is merely "an incident of the equitable remedy for the prevention of unfair labor practices", and a comparison is drawn between the present proceedings and other equitable actions. A similar construction is placed upon the statute in the dissenting opinion of Judge Garrecht, in *National Labor Relations Board v. Mackay Radio & Telegraph Co.* (C.

C. A. 9th, decided January 11, 1937), in which it is said that "this is a proceeding in equity and the primary relief sought is the reinstatement of the discharged employees and the award for wages at the regular rate of salary for the time out by reason of the wrongful discharge is an incident to the equitable relief granted." In other words, the petitioner's argument is that a jury trial is not essential in the present controversy, because it is in the nature of an equitable action to restore the status of the complaining employees, the remedy being a mandatory injunction, with damages awarded as an incident of complete relief.

If the petitioner's argument be accepted, its necessary implication is that the procedure prescribed by the Act is in derogation of Section 2 of Article III of the Constitution which ordains that "The Judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States * * *" Can there be any doubt that the Labor Act has sought to vest the powers of a constitutional court sitting in equity, in a quasi-judicial bureau which has no standing before the Constitution?

In this connection we submit that the construction of the Constitutional clause in *Crowell v. Benson*, 285 U. S. 22 (1932) is applicable, and that the procedural requirements of the Act are fatal to its validity, because they make no provision for and in fact deny a trial *de novo* before a constitutional court on jurisdictional issues. In the *Benson* case, the Court had before it proceedings under the Longshoremen's and Harbor Workers' Compensation Act, involving a claim for compensation by an injured employee. In the present case the claim is by a discharged employee for restoration of his employment, with compensation for lost pay. In each

case private rights are sought to be protected and private remedies granted.

The procedure of the Compensation Act, which was in issue in the *Benson* case, met the demands of the Constitution because Congress *had* provided for a hearing on jurisdictional issues in injunction proceedings in the District Courts. The Labor Act has no such saving grace, but, on the contrary, as we have pointed out, the *original jurisdiction* of the petitioner is made *exclusive* and the only mode of review is by appeal to the Circuit Court on the record made before the Board itself. The Circuit Court is not empowered to hear jurisdictional issues *de novo,* the scope of its review being confined to the written transcript, subject to further limitations in that only objections which have been urged before the Board are available and in that the findings of the Board are made conclusive.

We submit that the procedure which is authorized by the statute and which has been followed by the Board falls squarely within the condemnation of the majority opinion in the *Benson* case, in which it was said:

> "* * * It is rather a question of the appropriate maintenance of the federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency — in this instance a single deputy commissioner — for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action,

does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law." * * *

"In the present instance, the argument that the Congress has constituted the deputy commissioner a fact-finding tribunal is unavailing, as the contention makes the untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence even though a constitutional right may be involved. * * *"

"We think that the essential independence of the exercise of the judicial power of the United States, in the enforcement of constitutional rights requires that the federal court should determine such an issue *upon its own record and the facts elicited before it.* * * *" (Italics supplied). (pp. 56-57, 60, 64)

The petitioner may seek to brush aside the implications of the opinion in the *Benson* case by comparing the procedure in the present case to that which has been sanctioned by this Court with respect to the Federal Trade Commission. We submit that there is a clear distinction between the two agencies which nullifies the comparison. The Federal Trade Commission does not pretend to exercise any affirmative powers being merely an agency for the investigation and prevention of unfair

competition and violations of the Anti-Trust Acts. (Sept. 26, 1914, c. 311, §5, 38 Stat. 719; Feb, 13, 1925, c. 229, §2, 43 Stat. 939). Its orders are purely negative and it acts only in cases where the public interest is involved. [cf. *Federal Trade Commission v. Klesner*, 280 U. S. 19 (1929)] or where the United States is the real party in interest and the respondents are violators of quasi-penal statutes. The Commission does not take jurisdiction of controversies between private individuals, nor does it purport to exercise the right to grant affirmative relief to individual complainants. (*Federal Trade Commission v. Klesner, supra*). On the contrary, individuals who may have been prejudiced or damaged by unfair methods of competition or by violations of the Anti-Trust Acts must seek their redress in the constitutional courts. (cf. Oct. 15, 1914, c. 323, §4, 38 Stat. 731).

The petitioner may argue that, in the instant case, the award of an order of restoration of employment with back-pay, was merely incidental to a cease and desist order, but the nature of the complaint, the scope of the hearing and the character of the petitioner's own decision all belie such a position. In reply to such a contention, we will stand upon the record, for we are convinced that it will bear no other construction than that the principal object of the proceedings was the restoration of the complaining employees. This, too, was the primary aim of the petitioners' order, for the negative portions of its order are based upon its findings with respect to the disciplinary acts in issue and are ancillary to and in aid of its affirmative decree. (R. 33-45)

POINT IV.

The Provisions of the National Labor Relations Act Which the National Labor Relations Board Seeks to Apply to This Respondent Are Invalid and Void Under the Fifth Amendment to the Constitution of the United States.

As the statement of facts has indicated (pages 3 to 7 *supra*), the gravamen of the complaint of the National Labor Relations Board is the alleged wrongful discharge of ten production employees of the respondent. As we have pointed out, the decision of the Board has endeavored to color these charges by surrounding them with other findings that the respondent has discriminated against the Amalgamated Association of Iron, Steel and Tin Workers. These findings, which might be termed the atmosphere of the petitioners decision, are not justified by any competent evidence, being almost entirely based upon conditions and transactions alleged to have occurred long before the enactment of the National Labor Relations Act. The Board has also provided atmosphere for its decision by investigating the past history of industry in its attitude toward and relations with labor organizations. The great mass of theoretical data and opinion evidence received by the Board on this point is by no means competent evidence against the respondent. The procedure adopted by the Board in receiving this evidence in a joint hearing involving the respondent, Wheeling Steel Corporation and Crucible Steel Company, is an implied admission that it is not germane to the actual issues of this case. The history of past labor disputes, involving companies other than the respondent, can have no legitimate bearing upon the attitude of the respondent toward its employees.

A.

THE DECISIONS OF THIS COURT IN ADAIR v. UNITED STATES AND COPPAGE v. KANSAS ARE DETERMINATIVE IN THE PRESENT CASE.

The real issue in the present case, from a factual standpoint, is the alleged commission by the respondent of unfair labor practices in the discharge of union employees. The portion of the statute involved is Section 8 (3), which prohibits discrimination in regard to hire or tenure of employment or of any term or condition of employment to encourage or discourage membership in any labor organization. We believe that this provision constitutes an arbitrary interference with the respondent's freedom of contract and therefore violates the due process requirements of the Fifth Amendment to the Federal Constitution.

Adair v. United States, 208 U. S. 161 (1908) clearly declared that Congress, in the exercise of its regulatory power over interstate commerce, must obey the dictates of due process. More recently, in the Railway Pension case, (*Railroad Retirement Board v. The Alton Railroad Co. et al.,* 295 U. S. 330 (1935)), and then in a decision invalidating the Frazier-Lemke Farm Relief Act, (*Louisville Joint Stock Land Bank v. Radford,* 295 U. S. 555 (1935)), the Court has found Congressional legislation vulnerable because of its unwarranted infringement of the properties and liberties of the people. In the latter decision, speaking through Mr. Justice Brandeis, the Court declared: "The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment." In the former decision, the Court declared, in substance, as in the *Adair* case, that the Railway Pension Act not only was an excessive exercise of power over interstate commerce, but also was in plain disregard of due process requirements.

One of the foremost rights protected by the Constitution is the right to enter or refrain from normal contractual relations. It is a necessary corollary that the law must also respect the individual's freedom to contract concerning the normal incidents of his employment. Similarly, the employer enjoys a corresponding right to conduct his business in an orderly fashion, free from unjustifiable restraints and regimentation. See *Butchers Union Slaughterhouse Co. v. Crescent City Live-Stock Co.*, 111 U. S. 746 (1884), and *Allgeyer v. Louisiana*, 165 U. S. 578 (1897).

These rights have not been enforced in derogation of the Government's power to enact police measures for the protection of the health, safety and well-being of the citizens. Consequently, State laws regulating hours of labor, working conditions and the payment of wages have been upheld, to protect the physical well-being of employees and to prevent fraud and oppression. But once the Government has gone beyond police measures and deliberately interfered with freedom of contract, to force its temporary economic conceptions upon its citizens, the Court has scrutinized its legislative efforts with the greatest of care. The present statute clearly falls into this category. Its provisions relating to majority rule for purposes of collective bargaining and to unfair labor practices are not designed to protect the property of employers or the well-being of employees, but are rather intended to force a novel economic policy into the relations of employees with each other and with their employers. Therefore, it is proper to consider whether or not they infringe upon the freedom of the parties to such an extent as to render them subject to attack.

In *Adair v. United States*, 208 U. S. 161 (1908), similar legislation of Congress prohibiting discrimina-

tion by an employer against union members was invalidated, because it conflicted with the principle of *Allgeyer v. Louisiana*, 165 U. S. 578, *supra*, the Court stating:

"The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it."

"In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land." (pp. 174, 175)

Subsequently, in *Coppage v. Kansas*, 236 U. S. 1 (1914), the Court reexamined the *Adair* case. Again the conclusion was reached that such legislation constituted an unjustifiable interference with the freedom of contract, the Court declaring:

"Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense."

* * * * * *

"And can there be one rule of liberty for the labor organization and its members, and a different and more restrictive rule for employers. We think not; and since the relation of employer and employee is a voluntary relation, as clearly as is that be-

tween members of a labor organization, the employer has the same inherent right to prescribe the terms upon which he will consent to the relationship, and to have them fairly understood and expressed in advance." (pp. 14, 20)

See also: *Adkins v. Childrens Hospital*, 261 U. S. 525 (1923).

The provisions of the Labor Act which are in controversy in the present case present a much greater menace to the employer's freedom of contract than the enactments which were denied validity in the Coppage and Adair cases. In the Adair case the Court had before it a Federal statute prescribing, as a criminal offense, the discharge of an employee because of union activities, while the Kansas statute, which was involved in the Coppage case, merely prohibited employment contracts which required the employee to renounce his membership in a labor organization. The National Labor Relations Act not only prohibits the discharge of employees because of union activities, but it also pretends to give the petitioner authority to require the employer to restore employment. The dangerous implications of such procedure, which will be discussed subsequently in their application to the facts of the present case, are apparent. The employer may be compelled to continue a relationship which is not of his own seeking and his discretion in hiring and retaining employees is completely overridden.

The Labor Board contends that the principle of these decisions has been repudiated *sub silentio* in *Texas & New Orleans Railroad Co. v. Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548 (1930). A careful examination of the facts of that decision, beginning with the several proceedings in the District Court, is convincing that it has no application to the present case.

The *Texas & New Orleans Railroad* case arose under the Railway Labor Act of 1926 which, as we have stated, set up the machinery for the adjustment of disputes as to wages, hours of labor and conditions of employment. The statute did not prohibit or punish the refusal of an employer to employ union members, but provided for the selection of representatives by the carriers and their employees for purposes of adjustment and arbitration under the Act and declared that "representatives, for the purposes of this Act, shall be designated by the respective parties * * * without interference, influence or coercion * * *." The plaintiff organization applied for an increase of wages and after denial, the matter was referred to the United States Board of Mediation. The bill for an injunction alleged that the plaintiff was the authorized representative of the employees and that while the controversy was pending before the Board of Mediation, the defendant undertook the formation of a plant union completely subject to its control and had, in various ways, deliberately attempted to influence, intimidate and coerce members of the plantiff to withdraw in order that negotiations might be had with the new union instead of the plaintiff. The District Court, after a hearing, granted an injunction. Pending final hearing, the defendant proceeded to disregard the injunction and the plaintiff brought contempt proceedings. The lower Court found that the defendant had deliberately violated the restraining order and had by various means coerced and restrained its employees in the selection of a representative under the Act. One of the means complained of was the discharge of members of the plaintiff union. The Court held that the statute was constitutional, that the injunction was properly issued and that it was violated by the defendant's conduct. It therefore entered a decree requiring the defendant to purge itself of contempt by *restoring the*

status quo. When the case came on to final hearing, the District Court, in an opinion published in 25 F. (2d) 876, reaffirmed its previous position, denying a motion of the defendant to vacate the contempt order. *The opinion of the Court clearly indicates that in ordering the restoration of the union employees, it was merely directing the defendant to purge itself of its contempt of the Court's order.* As to this the District Court declared:

> "As to the restoration of Harper, Walker, Stotzer, Hudson, and Ginsberg, this also was merely an act of restoration of status, commanded in order to wipe out the effects and results of disobedience. Nothing in the order attempted to, nor could it, fix any time or conditions to the continuing in place of these persons. It merely declared that the severance of these relations and the disturbance of the *status quo* as to them, which the court found from the evidence had been brought about through a deliberate violation of the injunction order of the court, must be undone, and inferentially that it should not occur again for the same or similar reasons." (p. 877)

The same construction was placed on the Trial Court's decision by the Circuit Court of Appeals in 33 F. (2) 13 (1929).

On the point of constitutionality, the theory of the District Court is clear. It conceived that the Railroad, as a public service corporation, was required to continue operations so long as the government should direct. The Railway Labor Act of 1926 was held a proper exercise of the police power of Congress, because it was a means calculated to prevent the interruption of service. Since it was proper to provide a Board of Mediation for the adjustment of labor disputes, Congress had implied

power to provide means for the selection of representatives to appear before the Board. This clearly appears from the statement of the District Court in its opinion at 24 F. (2d) 426:

> "Nor can there longer be any doubt that Congress had the power to, and that it must, in the interest of public peace and safety, make certain, in the first step in negotiations between the railroad employer and employee (who have long since come to be recognized, as to this instrument of interstate commerce in their hands, not as private persons having the right to exercise 'liberty through sheer antipathy,' but as trustees of the public), that representatives of the railroad companies should not meet representatives of the employees, nominally elected by them, but in fact under the influence and control of the railroad companies. I therefore easily find that the legislation in question was not only within the power of Congress to enact, but that it should be liberally construed and applied, so as to give effect to the paramount public convenience subserved by it." (p. 431)

On appeal, in 33 F. (2d) 13, the Circuit Court of Appeals affirmed the doctrine of the trial court, in the following language:

> "We think that under the power to regulate interstate commerce it is competent for Congress to make provision for the settlement of disputes between interstate carriers and their employees with reference to rates of wages, rules, and working conditions, to the end of preventing such disputes resulting in the interruption or stopping of the movement in interstate commerce of freight or passengers. *Wilson v. New*, 243 U. S. 332, 37 S. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024." (p. 16)

This Court, as we have stated at another point in this brief (see *supra* page 76), adopted the arguments of the lower courts in sustaining the statute.

It will be seen from the foregoing discussion that the *Texas & New Orleans* case in no way conflicts with the *Coppage* case or the *Adair* case. The more recent decision did not involve a statutory prohibition against the discharge of union members. The Railway Labor Act merely forbade interference with the process of selecting representatives for mediation purposes, and the preliminary injunction of the District Court had sought to enforce the statutory command. When its injunction was violated, through the consistent campaign of the railroad to undermine the plaintiff organization, the District Court adjudged the defendant in contempt and as a part of its judgment, required the defendant to restore the status existing before its decree, even though this required the restoration of certain union employees.

This distinction between the earlier decisions in the *Adair* and *Coppage* cases and the recent decision in the *Texas & New Orleans Railroad Company* case is well stated in the opinion of Judge Wilbur of the Circuit Court of Appeals for the Ninth Circuit, in *National Labor Relations Board v. Mackey Radio & Telegraph Company* (decided January 11, 1937). Judge Wilbur says:

> "It is thus apparent that the Supreme Court had under consideration in *Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks*, 281 & S. 548, *supra*, the single question of whether or not Congress in setting up a scheme for voluntary arbitration of railway labor disputes could prohibit interference by the one party, the Railroad Company, with the rights of the other parties, the employees to select those who were to represent them in the

proposed arbitration, or it might be put thus, were the representatives selected by the employees for bargaining with the employer as to the proposed arbitration to be acceptable to the employer or to the employees? It is clear, as the court stated, that the principles announced in *Adair v. United States*, have no relevancy to this question. It is equally clear that *Texas & N. O. R. Co. v. Brotherhood, etc., supra*, does not modify nor overrule the earlier cases. In this regard it should be stated that some confusion arises in a consideration of this decision from the fact that the trial judge, in his adjudication of contempt in the *Texas and New Orleans R. R.* case required the Railroad Company to restore certain employees who had been discharged in violation of the injunction. This inherent power of the court to enforce its injunctive orders has nothing to do with the power of Congress to regulate or interfere with the right of contract. It is not altogether clear that the Supreme Court had before it the question of the validity of the order adjudging the Railroad Company guilty of contempt. In any event the decision on that question is irrelevant to the issue in the case at bar.

"What the petitioner seeks in this case is the approval and the enforcement of an order which clearly violates the fundamental right of the respondent guaranteed to it by the Fifth Amendment to the Constitution. If we act upon the principles of constitutional law relating to the liberty to contract as announced by the Supreme Court in *Adair v. United States, supra*, and *Coppage v. Kansas, supra*, our inquiry would end here for it was there held that an employer had a right to refuse to contract with a present or prospective member of a labor organization, if he so desired, and that an act

> of Congress, in one case, and a statute of a state, in the other, which prohibited that exercise of discretion, or choice, on the part of the employer was unconstitutional and void because a violation of the Fifth Amendment."

The petitioner makes a brave effort to compare the facts of this case with the issues of the Texas & New Orleans Railroad Company case, by pointing out that its order against the respondent was designed primarily to enjoin the respondent from interfering with the organization activities of its employees and that it directed the restoration of the complaining employees as a mere incident to this negative relief. This argument is subject to two serious objections. In the first place, the entire record demonstrates that the primary purpose of the suit was the restoration of the ten employees, the "cease and desist" portions of the petitioner's decree being purely ancillary. In the second place, the petitioner's argument, in stressing that the respondent has no constitutional right to interfere with the organization activities of its employees, totally disregards the fact that its own order purports to deprive the respondent of its constitutional right to employ in accordance with its own selection.

Nor is this the only distinction between the legislation which was in issue in the Texas & New Orleans case and the National Labor Relations Act, as it applies to the petitioner.

As we have stressed before, the power of Congress over interstate carriers is almost plenary in character. Carriers, being public utilities, are required to maintain a continuous service and Congress may, if it deems fit, compel the carrier to maintain such service, even against its wishes. The drastic wage-fixing provisions of the Adamson Act would not have been upheld in *Wilson v.*

New, 243 U. S. 332 (1917), if this Court had not believed that it was "essential to protect the public right and safeguard the movement of interstate commerce * * *."

No one could contend that the respondent is in the same category as a railroad or that Congress would have the right to compel it to continue operations against its will. *This distinction is absolutely fundamental.*

Thus in *Chas. Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522 (1923), a Kansas statute creating an industrial court with power to hear disputes between employer and employees over wages and other terms of employment was involved. The statute was confined in operation to employers engaged in the business of manufacturing food and certain other more or less essential industries, the determination of the public character of the employer's business being vested in the industrial court. The Court said of the statute that:

> "It curtails the right of the employer on the one hand, and of the employee on the other, to contract about his affairs. This is part of the liberty of the individual protected by the guaranty of the due process clause of the Fourteenth Amendment. *Meyer v. Nebraska*, 262 U. S. 390 (1923). While there is no such thing as absolute freedom of contract, and it is subject to a variety of restraints, they must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception." (p. 534)

An argument in support of the statute was made, that it applied only to businesses affected with a public interest, and reference was made to the case of *Wilson v. New, supra.* The Court pointed out that the distinction lay in the fact that Congress had power to compel the continued operation of the railroads, and therefore to pass regulations which would insure such continuity

of operations. This element, the Court declared, was lacking in ordinary businesses, irrespective of their size and importance, stating:

> "But the chief and conclusive distinction between *Wilson v. New* and the case before us is that already referred to. The power of a Legislature to compel continuity in a business can only arise where the obligation of continued service by the owner and its employees is direct and is assumed when the business is entered upon. A common carrier, which accepts a railroad franchise, is not free to withdraw the use of that which it has granted to the public. It is true that if operation is impossible without continuous loss (*Brooks-Scanlon Co. v. R. R. Commission*, 251 U. S. 396; *Bullock v. R. R. Commission*, 254 U. S. 513, it may give up its franchise and enterprise, but, short of this, it must continue. Not so the owner, when by mere changed conditions his business becomes clothed with a public interest. He may stop at will, whether the business be losing or profitable.
>
> The minutely detailed government supervision, including that of their relations to their employees, to which the railroads of the country have been gradually subjected by Congress through its power over interstate commerce, furnishes no precedent for regulation of the business of the plaintiff in error, whose classification as public is at the best doubtful." (pp. 543-544)

This principle was reiterated, when the statute came before the Court again (287 U. S. 552), in the statement that:

> "The Court recognized that, in a sense, all business is of some concern to the public, and subject to some measure of regulation, but made it plain that the extent to which regulation reasonably may go

varies greatly with different classes of business, and is not a matter of legislative discretion solely, but is a judicial question to be determined with due regard to the rights of the owner and employees. Care was taken to point out that operating a railroad, keeping an inn, conducting an elevator and following a common calling are not all in the same class, and particularly to point out the distinctions between quasi public business conducted under a public grant imposing a correlative duty to operate, a business originally private which comes to be affected with a public interest through a change in pais, and a business which not only was private in the beginning but has remained such. The conclusion was that power to compel the continuance of a business because affected with a public interest is altogether exceptional."

"The system of compulsory arbitration which the act establishes is intended to compel, and if sustained will compel, the owner and employes to continue the business on terms which are not of their making. It will constrain them, not merely to respect the terms if they continue the business, but will constrain them to continue the business on those terms. True, the terms have some qualifications, but as shown in the prior decision the qualifications are rather illusory and do not subtract much from the duty imposed. Such a system infringes the liberty of contract and rights of property guaranteed by the due process of law clause of the Fourteenth Amendment." (pp. 567, 569)

That the size of the respondents business has no bearing on the question is indicated in *Williams v. Standard Oil Co.*, 278 U. S. 235 (1929), where it was said:

"Affirmatively, it means that a business or property, in order to be affected with a public interest,

must be such or be so employed as to justify the conclusion that it has been devoted to a public use and its use thereby in effect granted to the public. *Tyson & Brother v. Banton, supra,* at p. 434. Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. * * *" (p. 240)

See also

Ribnik v. McBride, 277 U. S. 350 (1928);
Tyson & Bro. v. Banton, 273 U. S. 418 (1927);
New State Ice Co. v. Liebmann, 285 U. S. 262 (1932).

B.

THE PETITIONER'S ACTION CONSTITUTES AN UNLAWFUL INTERFERENCE WITH THE NORMAL RIGHT OF THE RESPONDENT TO MANAGE ITS OWN BUSINESS.

The text of this brief might well be taken from the paragraph of the majority opinion in *Railroad Retirement Board v. The Alton Railroad Co., et al.,* 295 U. S. 330 (1935), where, in speaking of the *Texas & New Orleans Railroad* decision, it was said:

"The railroad labor act was upheld by this court upon the express ground that to facilitate the amicable settlement of disputes which threatened the service of the necessary agencies of interstate transportation tended to prevent interruptions of service and was therefore within the delegated power of regulation. *It was pointed out that the act did not interfere with the normal right of the carrier to select its employees or discharge them. Texas & New Orleans R. Co. v. Brotherhood of Railway &*

S. S. Clerks, 281 U. S. 548, 570, 571." (Italics supplied) (p. 369)

Apply this to the instant case and the results are convincing that the decision of the Labor Board cannot be sustained. In questions of employer-employee relationships, the law has always been hesitant to interfere. Courts of equity from time immemorial have refused to compel specific performance of an employment contract as against either the employer or the employee. From the standpoint of the employee, the law has recognized that he should not be forced into a relationship which may be distasteful to him. From the standpoint of the employer, the courts have recognized that the right to judge the capabilities of his employees is absolutely essential to the proper management of a business. A variety of reasons may lead an employer to discharge an employee. It may be a question of efficiency, of application, or discipline. On other occasions the employer may be required to take action to protect the morale of his other employees, to prevent dissatisfaction of other workers, or to put an end to suspected theft, sabotage or other undesirable conditions. In such cases, it may be preferable, for obvious reasons of policy, to withhold disclosure of the cause of the discharge. In any case the question of judgment is a delicate one which the law has always seen fit to rest in the personal discretion of the employer. If it is proper for the law to deprive the employer of his right to judgment and to rest the function in a board of this character, and then *to compel* the employer to restore the employee who has been discharged, there is an end to efficient management.

The facts of the present case will provide a striking illustration of the menace to the respondent's freedom which inheres in the Labor Act. If the facts with respect to the alleged cases of distrimination are recalled,

it will be observed that in each case the complaining employees were in some way at fault, their principal excuses being that the respondent had not been diligent in discharging other employees for similar faults, or that other employees were the responsible ones. Two of the witnesses charged the respondent with discrimination as to working time, but when they estimated their loss of wages, for purposes of damages, they admitted that they had been receiving fairly steady work. In several instances members of the Board supplied the necessary answers for the witnesses by the form of their questions. If the record is stripped of the atmosphere which was engendered by the hostility of the complaining witnesses, it will be seen that in each case the propriety of the discharge was a matter of discretion, with the petitioner assuming that the discharge must have been wrongful because the complaining witness was a member of a union and because his faults were not, in petitioner's judgment, sufficient to warrant such drastic action.

In short, the petitioner has sat in judgment upon the respondent and determined that it has not properly exercised its discretion to hire and discharge employees. If this is not an interference with the normal right of the respondent to manage its own business (to paraphrase the language of the Court in the *Texas and New Orleans* case), then it would be difficult to find anything which would be. In no case has the law gone to the lengths of requiring an employer to rehire an employee who is considered unfit. Even in cases of a long-term employment contract, the law, at most, awards damages for its breach; it does not compel its continuance.

The language of a New York Court in *H. B. Rosenthal-Ettlinger Co. v. Schlossberg,* 266 N. Y. Supp. 762 (1933), in dealing with a similar provision in Section 7A of the National Recovery Act, is in point:

> "If that (Section 7 A) means that an employer may not discharge an employee for any reason, or for no reason, and in the case of any man discharged, must be prepared to show good cause for the discharge, other than the union affiliations of the man discharged, all employees who are union members have been transferred to a status equivalent to that of the civil service, a result which could not have been intended. Whatever the rule of the unions may be, that is not the law of the land." (p. 764)

This suggests another dangerous consequence of the Labor Act, which is of peculiar importance in the present case. The decision of the Board argues vehemently that there must have been discrimination, because three of the discharged employees were officers of the union. If union members are a preferred class in "a status equivalent to that of the civil service," it is not surprising that some of the union officers, relying upon their sure tenure of employment and immunity from discipline, should be found among those discharged for insubordination or insolence. If the Act gives union men freedom from discharge, it encourages laziness, violation of rules and inefficiency. Employees who are affiliated with a union will consider that fact sufficient protection against demotion or discharge, if the law is to make the employer produce an iron-clad excuse for every disciplinary act. One of the witnesses in this case, who was discharged because a nut fell off a crane which he was required to inspect said he would not go to see if the nut had fallen off (R. 158). Another was not on the job when he was summoned to duty and complains because he was disciplined (R. 174). He apparently believed it union discrimination because he was not given time off to go to a picnic (R. 172). These are trifling things, but they indicate the attitude of insolence and defiance which the Board has encouraged.

In addition to ordering the reinstatement of ten employees, the petitioner ordered the respondent to post notices in conspicuous places in each shop and yard, stating that the respondent "*will not discharge* or in any manner discriminate against members of, or those desiring to become members of, Beaver Valley Lodge No. 200, Amalgamated Association of Iron, Steel and Tin Workers of North America, or persons assisting said organizations or otherwise engaging in union activities * * *."

Such a notice would almost force employees to join the union. No other interpretation would be put upon it by a body of working men. It is the equivalent of telling them that if they become affiliated with this union, they will be thenceforth immune from discharge.

The respondent has 10,000 employees in the Aliquippa plant and 22,000 employees in the vicinity of Pittsburgh. The effect of the reinstatement of those ten men upon the discipline and morale of thousands of workmen would be incalculable. The impaired efficiency, insubordination and confusion which would result among other employees would cost the respondent many thousands of dollars and deprive it of property of substantial value far in excess of the amount of wages involved in this particular case.

The National Labor Relations Board in this case has said that the respondent must revoke its considered judgment and must retain and pay wages to employees whom it has deemed unfit to work in its plant. The judgment of the employer, though it be based on considerations of efficiency, morale, discipline or safety, is arbitrarily set aside and the freedom and rights of the employer abandoned to enforce a dubious economic policy. What right would the Congress of the United States have to compel this respondent to operate its plant if it

desired to discontinue operations or to require it to operate in a way which economists might deem more efficient? By the same token, what right has the Federal Government to require it to enter into a relationship which it condemns as opposed to its best judgment? And what right has the National Labor Relations Board, with its apparent objective of organizing the Steel Industry, to usurp the management of the respondent and to encourage laziness, disobedience and sabotage among its employees?

In closing this point of the case, it might be well to advert briefly to the underlying philosophy of the National Labor Relations Act. As we have pointed out in our discussion of the substantive provisions of the Act, Section 9 establishes the so-called majority rule, which, in effect, declares that the Board has the power to certify the representatives of a majority of the employees as the exclusive representatives of all the employes, for purposes of collective bargaining with respect to wages, hours of labor and working conditions. Individual employees and minority groups are thereby deprived of their right to bargain with their employer, although the right to present individual grievances is preserved. The other provisions of the Act are designed, in the last analysis, to buttress the effect of the majority rule. National labor organizations are sanctioned as the exclusive representatives of employees by Section 7 of the Act. Section 8 penalizes the employer who seeks to encourage or discourage membership in a union, but at the same time expressly sanctions the closed shop contract, if entered into between the employer and the union representing the majority of his employees. In other words, while the employer may not discharge a union employee, he may insist that all of his employees shall join, support and pay dues to an organization which is the favorite of the majority. Subdivision 5 of Sec-

tion 8 lends further weight to the majority rule, by requiring the employer to bargain exclusively with the representatives of the majority.

The petitioner, in its argument in this case, does not refer to the question of majority rule and will no doubt argue that its decision and order have not applied it in this case. Nevertheless, the testimony which was received extolled the virtues of exclusive representation by an organization, as well as the alleged advantages of a closed shop, and it is clearly the theory of the petitioner, as we have demonstrated, that if the respondent's plant were organized, the movement of interstate commerce would be free from potential restraints. Because of this fact, we think that we are entitled to observe that the underlying philosophy of the Act was condemned by the Court as an unreasonable restraint on freedom to contract. The Bituminous Coal Conservation Act of 1935 provided that wages and hours of labor should be governed in the coal industry by collective agreements between representatives of the producer and representatives of "a majority of the mine workers." The Court, in *Carter v. Carter Coal Co.*, 298 U. S. 238, *supra*, adverted briefly to this provision, in the statement:

> "The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. The record shows that the conditions of competition differ among the various localities. In some, coal dealers compete among themselves. In other localities, they also

compete with the mechanical production of electrical energy and of natural gas. Some coal producers favor the code; others oppose it; and the record clearly indicates that this diversity of view arises from their conflicting and even antagonistic interests. The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court, which foreclose the question. *Schechter Corp. v. United States,* 295 U. S. at p. 537; *Eubank v. Richmond,* 226 U. S. 137, 143; *Seattle Trust Co. v. Roberg,* 278 U. S. 116, 121-122." (pp. 311-312)

CONCLUSION.

The bulk of the testimony heard by the petitioner consisted of expert, economic and political opinion which depicted the harmful effects of labor disputes and strikes and extolled the virtues of organization and union contracts. Considering that this phase of the hearing was entirely *ex parte* and that no witnesses appeared to point out the disadvantages of a "closed shop" and its injustice to employees who desire to work without joining any union, it is not surprising that the

argument may, at first glance, seem persuasive. The fact is, however, that it is wholly immaterial.

In complete disregard of the respondent's right to manage and enjoy the fruits of its own property under the due process clause, the petitioner is asking this Court to find that the advantages of union organization outweigh the dangers of infringing upon the respondent's freedom of contract. Legal justification for the action of the Board cannot be supplied by the reference to the economists who appeared as expert witnesses, to testify to their views that union organization and the "closed shop" would be better for industry and the country generally.

For *their* views they are answerable to no one but themselves and, if they are wrong, they bear none of the losses, while the management of a large corporation is responsible to its stockholders and to its employees for the conduct of the business. The open shop policy, so long pursued by the vast majority of American employers, has enabled them to protect the interests of their employees, who do not desire unionization, and to compel unions, in a measure, to rely upon their own merits to expand their membership, instead of depending upon compulsory membership by operation of laws. American industry has gone far under such a policy, with benefit not only to stockholders, but also to employees.

If the experts and economists who spoke before the Board can thrust upon the employer, as the petitioner urges, a new economic policy with respect to labor, and if the National Labor Relations Board can, by its decision, scrap the considerations which led to the discharge of a few of respondent's employees and force their reinstatement, upon the basis of the economists' theories as to the proper method of handling labor

problems, there would seem to be no reason why other boards and bureaus could not be authorized by Congress to dictate or control other business policies of employers.

The same methods have been used to persuade this Court that the Labor Act is an appropriate vehicle for Federal action. The argument again is one of expediency, and not of law. Perhaps the Congress of the United States is better fitted to deal with the problem of labor relations than the legislative bodies of the separate States. Perhaps the management and regulation of every business by commissions and boards, who are not responsible to the owners, would carry the same appeal to the economists and theorists who testified in this case. But such regimentation is not permitted under our fundamental law. A brief phrase from the opinion of Judge Hand of the Second Circuit, in the *Schechter* case, is a better reply to the petitioner's argument than a host of economic treatises:

> "It may indeed follow that the nation cannot, as a unit, meet any of the great crises of its existence, except war, and that it must obtain the concurrence of the separate states; but that to some extent is implicit in any federation, and the resulting weaknesses have not hitherto been thought to outweigh the dangers of a completely centralized government. *If the American people have come to believe otherwise, Congress is not their accredited organ to express their will to change.*" [*United States v. A. L. A. Schechter Poultry Corporation*, 76 F (2) 617, 627 (1935)].

For more than a century this Court has steadfastly adhered to the simple, literal meaning which the great Marshall found in the commerce clause—that Congress has power—in the words of the Constitution—"*to regulate commerce among the several states.*" Since *Gib-*

bone v. Ogden, it has given assurance to the States, to their citizens and to the federal union that their respective rights and powers, as the Constitution fixes them, shall be preserved. The taxing authority and police powers of the several States have been protected from encroachment because this Court has always ruled that local activities, such as mining and industry, are within their exclusive jurisdiction. By the same devotion to the mandate of the Constitution, the rights of individuals to freedom from unjustifiable restraint have been sanctioned.

The petitioner is asking that the traditions and precedents of a century be cast aside and the Constitution corrupted for the sake of a temporary expediency. To change *the established meaning* of the Constitution now, by judicial decree, without a proper mandate from the people, would make a mockery of constitutional government.

Respectfully submitted,

EARL F. REED,
CHARLES ROSEN,
W. D. EVANS,
JOHN E. LAUGHLIN, JR.,
Attorneys for Respondent.

THORP, BOSTWICK, REED & ARMSTRONG,
2812 Grant Building,
Pittsburgh, Pa.

ROSEN, KAMMER, WOLFF & FARRAR,
Hibernia Bank Building,
New Orleans, La.